CANADA
PROVINCE OF NOVA SCOTIA
2021 **YAR NO. 510031**

SUPREME COURT OF NOVA SCOTIA

CITIZENS ALLIANCE OF NOVA SCOTIA and **J.M., BY HIS LITIGATION GUARDIAN K.M.**

Applicants

- and -

ROBERT STRANG, ACTING AS CHIEF MEDICAL OFFICER OF HEALTH OF NOVA SCOTIA and **MICHELLE THOMPSON, ACTING AS MINISTER OF HEALTH AND WELLNESS OF NOVA SCOTIA**, and **THE ATTORNEY GENERAL OF NOVA SCOTIA REPRESENTING HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF NOVA SCOTIA**

Respondents

HEARING

HEARD BEFORE: The Honourable Justice John A. Keith

PLACE HEARD: Yarmouth Courthouse
Courtroom 2
164 Main St
Yarmouth, Nova Scotia

DATE HEARD: December 6, 2024

APPEARANCES:

Mr. William Ray	Agent for the Applicant, CANS
Mr. Hugh E. Robichaud Ms. Berli Olivier	for the Applicant, J.M., by his Litigation Guardian, K.M.
Mr. Daniel Boyle	for the Respondents

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December 6, 2024 **Yarmouth, Nova Scotia**

COURT OPENS **(9:40 A.M.)**

THE CLERK: All rise, please.

This session of the Yarmouth Supreme Court, with the Honourable Justice Muise presiding, is now open.

God Save the King.

THE COURT: Thank you, everyone. Please be seated.

MR. BOYLE: Good morning, Justice.

THE COURT: Sorry for the brief delay. There was some technical issues, but we have them resolved now.

So, morning Mr. Boyle.

MR. BOYLE: Good morning, Justice.

THE COURT: Mr. Ray.

MR. RAY: Justice.

THE COURT: And you're with Ms. Samin Dattara, is that ---

MS. IBRAHIM: Tara Ibrahim.

THE COURT: Ibraham, sorry, Ms. Ibraham. And for Ms. J.M., it's not Mr. Robichaud.

MS. OLIVIER: Good morning, Your Honour -- My Lord, this is Berli Olivier on Hugh Robichaud's behalf.

THE COURT: Okay.

MS. OLIVIER: Mr. Robichaud asked that I apologize for him not being able to be here because of medical reasons.

THE COURT: Okay, thanks very much. And again, I asked this before, but how do you spell your last name again?

MS. OLIVIER: My last name, it’s Olivier, O-l-i-v-i-e-r.

THE COURT: L-o-i-v-i-e-r?

MS. OLIVIER: “O” at the beginning.

THE COURT: O-l -- Olivier?

MS. OLIVIER: Yes.

THE COURT: Okay, thank you.

MS. OLIVIER: Thank you.

THE COURT: Okay, I think we discussed the order of proceedings today. We're going to deal first with your concerns around evidence. Is that right, Mr. Boyle?

MR. BOYLE: Thank you, Justice. That's acceptable to me, yes.

THE COURT: Okay. And then, Mr. Ray, you would like to cross-examine the Crown witness, is that right?

MR. RAY: Yes, My Lord.

THE COURT: Okay. And then we'll go into oral argument.

Is there anything else that we need to talk about as a preliminary matter?

MR. BOYLE: No, Justice. I will just note for the record that Ms. Walsh is present in the

building but is outside the courtroom for purpose of preliminary matters and can be called when necessary.

THE COURT: Okay. And I should say as well, I also have initialled the draft order; thanks for agreeing on the form, so that that's been addressed.

Okay. Your Motion to strike portions of the affidavit, Mr. Boyle, the floor is yours.

MR. BOYLE: Thank you, Justice.

SUBMISSIONS ON MOTION TO STRIKE PORTIONS OF AFFIDAVIT BY MR. BOYLE

MR. BOYLE: The two affidavits in question are those of Shelley Hipson and the affidavit of Chris Milburn. I don't have in front of me issued copies of the affidavits. I'm presuming that the form of the *jurats* and the execution is appropriate and I'm not raising issues on those bases, I'm challenging the contents.

THE COURT: Now, I will say I don't have signed copies, I got the unsigned copies. But I just want to make sure that the copies that the Court has -- the electronic copies I have, were not signed. I want to make sure; is yours signed, Mr. -- the draft signed, and is the affidavit signed, Mr. Boyle?

MR. BOYLE: No, Justice, the copies I have are the drafts that were not executed, but I understand they represent the final product that was filed with the Court.

THE COURT: All right, let's just make sure that we have the final -- the affidavit of Dr. Milburn and Ms. Hipson.

(SHORT PAUSE)

THE CLERK: What is the file name?

THE COURT: Milburn and Hipson are the affiants.

THE COURT: Did you file signed copies, Mr. Ray?

MR. RAY: As I understand it, the copy of Ms. Hipson's signed document is downstairs, or in the building. The copy of Dr. Milburn's was mailed, I guess, two days ago.

MS. OLIVIER: It's in transit.

MR. RAY: So I ---

THE COURT: So when you file documents they need to be filed well in advance of the hearing. You can't just sort of mail them and hope we get them with the signed -- with the signature, particularly when there's a

postal strike. So I'm not sure how they were mailed, but ---

MR. RAY: Courier; they were couriered, I am informed, but...

THE COURT: Okay. And the copy of Ms. Hipson's affidavit, has it been filed or does she just have it in her hand downstairs?

MR. RAY: It was turned in downstairs this morning, so I'm not sure where it would be after that.

I am informed, though, that we did question the Prononotary [*sic*] this morning.

THE COURT: The Prothonotary, yeah.

MR. RAY: And were informed that she had not received Dr. Milburn's signed affidavit, My Lord.

THE COURT: Okay. Is Dr. Milburn here?

MR. RAY: He is not, My Lord, no.

THE COURT: Well, I had assumed that

there were signed copies in the court and that Mr. Boyle's concerns were more in terms of how the signed versions were referring to the exhibits. That was one of the concerns. Is that right, or was it that we just don't even have a signed copy, Mr. Boyle?

MR. BOYLE: Well, I had been of the same understanding as Your Lordship that there were signed copies with the court, and appreciating the postal strike and Citizens Alliance being self-represented, I had accepted that the representation they had been filed was accurate and was prepared to proceed on that basis.

THE COURT: Yeah.

MR. BOYLE: But if the -- if the documents are not filed with the court, that would be a different matter, Justice.

THE CLERK: (Inaudible due to away from microphone) Prothonotary.

THE COURT: Pardon me?

Okay. So we have -- you're saying we

have Ms. Hipson's sworn affidavit here today?

MR. RAY: Yes, My Lord.

THE COURT: Okay. What date was it sworn?

MR. RAY: That would have been on the 19th.

THE COURT: Of November?

MR. RAY: Yes. Yes, My Lord.

THE COURT: And in Shelburne?

MR. RAY: Yes, My Lord.

Okay.

THE COURT: And she only brought it to court today?

MR. RAY: As I understand, My Lord, yes.

THE COURT: Okay. I just assumed that the filings had occurred. It looks like incorrectly, because we don't have Dr. Milburn's sworn affidavit and we don't have Ms. Hipson's sworn affidavit.

Do you know if Dr. Milburn swore the same affidavit that was sent electronically?

MR. RAY: Yes, My Lord it's the same document.

THE COURT: Okay.

Mr. Boyle.

MR. BOYLE: Well, Justice, I'll take your direction on how best to proceed, but I had been on the assumption that there were sworn documents in the court. Not having any documents on the record, I think it's a bit difficult to challenge a document that's not properly in evidence at this time.

With respect to Ms. Hipson's affidavit, if that is in the building, perhaps a brief recess to confirm and review would be appropriate before moving on to the concerns I had with her affidavit.

THE COURT: And one alternative might be to -- one alternative might be to get Ms. Hipson's affidavit; hopefully it's properly sworn and signed and

everything else. And the other might be to proceed on the basis that Dr. Milburn's affidavit would be received within the next day or two, although we could be wasting our time because if it comes in and it's not the same document or it's a different document or there's some sort of change...

MR. BOYLE: That's my worry, Justice, that we would be discussing a document that is not in evidence and has not yet been filed. I feel like we're getting the cart before the horse if we proceed in that manner, Justice.

THE COURT: Do you know how he couriered it, Mr. Ray? We haven't received that ---

MR. RAY: No, I do not, My Lord. Sorry.

THE COURT: When's the last time you spoke to Dr. Milburn?

MR. RAY: Apparently, My Lord, my colleague is speaking to him right now downstairs, but he

is not --, he is not physically present here, My Lord.

THE COURT: Because if he was present we could at least print out a copy and have him sign it right here and now.

MR. RAY: My Lord, if ---

THE COURT: Is he accessible? Is he being -- are they speaking to him right now?

MR. RAY: I believe so, My Lord, yes.

THE COURT: Okay. Let's break for 10 minutes. We'll start at 10:00 again. We'll try and track down what Ms. Hipson filed this morning, and we'll see what we can do about Dr. Milburn to get his sworn affidavit. We can't proceed on the basis of an unsigned document; we just can't do it. It's just not fair to the Crown, it’s not fair to the Court.

MR. RAY: I understand, My Lord.

THE COURT: So I know you're self-represented, and we went through this before, but you do need to familiarize yourself with some of the basic rules

of the court. I don't think it's a stretch to ask that people file signed documents so that we know the person who's attesting to the information and testifying to the evidence actually read it, signed it, and adopted the evidence.

MR. RAY: I understand, My Lord, yes.

THE COURT: It's just -- it's, I have to say, Mr. Ray, it's just not acceptable. I can't ---

MR. RAY: I understand, My Lord.

THE COURT: I can't excuse behaviour that I just -- you know, we're all operating on the assumption that these signed affidavits are here and they're just not. I have nothing right now in front of me.

MR. RAY: My Lord.

THE COURT: All right, let's break till 10:00, and if you have an alternative that you can speak to Mr. Boyle about, in terms of how to get Mr. Milburn's evidence to the court -- sworn evidence to the

court ASAP, that's one alternative.

Another alternative -- another alternative would be to simply proceed without Mr. Milburn's affidavit at all, so you wouldn't have his evidence in, and then a final alternative might be to adjourn, but if we're going to adjourn, there will be costs because this is not on the Crown at this stage. This is not the Crown's fault.

MR. RAY: We understand, My Lord, and if -- we will put up no argument, if you are not satisfied about the state of Mr. Milburn's evidence, we will not put up an argument there and we will simply, I guess, have a discussion about Ms. Hipson.

THE COURT: We'll have to decide what to do in terms of either striking the affidavit or it's not -- nothing to strike right now because there's nothing in front of me, or proceeding without it or -- and just going forward with Ms. Hipson's affidavit or -- and you'll have to decide whether or not that's sufficient or if you

feel like you really need it before the Court. And if that's the case, then there might have to be a request for an adjournment. I'm not saying I'm going to grant it; I'd have to hear from Mr. Boyle. And we'll go from there.

I will say, though, Mr. Ray, and I know I may be repeating myself, but it would really assist you and the Court if you got somebody online to help you with some of the procedural aspects of the legal process. This isn't the first time we've run into this issue, and I don't want to see your case and your organization's case diminished for these types of issues. And I don't want the Court to appear like it's being too technical, but the reality is I do need -- and I think if it was on the other foot, you would want to know that the evidence you're confronting has been actually read by the affiant and sworn and signed, so...

MR. RAY: Absolutely, My Lord. If we have not met the rules of the court in any specific way on these affidavits, again, we will not put up a fight about

it.

THE COURT: Well, we'll have to deal with what you want to do and how important you think the evidence is.

Okay, we'll break for 10 minutes. We'll come back at a little after 10:00.

THE CLERK: All rise, please.

Court is in recess.

--- Court recesses at 9:53 a.m.

--- Court resumes at 10:13 a.m.

THE CLERK: All rise, please.

THE COURT: Thank you, everyone. Please be seated.

Okay. I checked with the Prothonotary. they hadn't received it yet from Ms. Hipson. So, Mr. Ray, where do we stand?

MR. RAY: My Lord, if the signed documents are not in the courthouse, we are prepared to proceed without them without further argument, My Lord.

THE COURT: Without Dr. Milburn's affidavit or without Ms. Hipson's affidavit?

MR. RAY: Yes, My Lord. On Dr. Milburn's affidavit, ---

THE COURT: Yeah.

MR. RAY: --- the evidentiary submissions attached thereto are government documents.

THE COURT: Yeah.

MR. RAY: So we would ask if you would consider accepting the *Health Protection Act* and the guide to the *Health Protection Act* under Rule XIII of the *Evidence Act of Nova Scotia*.

THE COURT: Well, I don't see any issue with the *Health Protection Act*, certainly. You're entitled to rely on legislation; it's binding on the citizens Nova Scotia, it's legal authority.

MR. RAY: Okay, My Lord.

THE COURT: So I have no issue with that. What about -- that's the first exhibit, isn't it, t

that you're -- what you have in your hand there, the Regulations or something?

MR. RAY: This? The first exhibit, I believe, in his affidavit is the Guide to the Health Regulations.

THE COURT: Okay.

MR. RAY: This is a government document issued to health providers in 2005 to explain the *Nova Scotia Health Protection Act*, their duties under it, the powers of the CMOH, et cetera.

THE COURT: All right. So your proposal is that we proceed in the absence of the affidavit of Ms. Hipson and Dr. Milburn, on the understanding that you'd be entitled to rely upon the *Health Protection Act*, which I think is uncontroversial, but also the contents of that Guide to the Health Regulations, which you say explain the *Health Protection Act*?

MR. RAY: Yes, My Lord. We would --

we would humbly ask we'd be allowed to rely on that under Rule XIII.

THE COURT: Right. And proceed otherwise without the affidavits?

MR. RAY: Yes, My Lord.

THE COURT: Okay.

And, Mr. Boyle, what do you say to that?

MR. BOYLE: Thank you, Justice. I agree with respect to the *Health Protection Act*; there's no concern there with respect to the guide that's contained at the first tab of the unsworn affidavit of Dr. Milburn.

THE COURT: Go ahead and have a seat, Mr. Ray; we'll get back to you.

Go ahead.

MR. BOYLE: Thank you.

I do have some concern. The document was dated fall 2005; as Mr. Ray indicated that was

circulated 2005. I'm not clear whether a more current version exists, or how that might factor into the uses to which Mr. Ray intends to put it. If it were in by way of evidence, that's one thing, but absent an opportunity to confirm its currency, I would have some concern as to its utility.

THE COURT: But do you doubt that it was ---

MR. BOYLE: Justice, I think I ---

THE COURT: Your witness is going to be cross-examined.

MR. BOYLE: Yes, Justice.

THE COURT: So could this document go in through her?

MR. BOYLE: I can't speak to her competency to speak to this document that was, per Mr. Ray's submission, circulated in 2005.

THE COURT: Right. But she could -- might be able to speak to whether or not it's current or

not current or if there's anything ---

MR. BOYLE: I'm sorry, Justice?

THE COURT: She could, if put to her on cross, speak to whether or not it's current or not current. She may say, "I know"; "I don't know."

MR. BOYLE: She may be able to, I cannot say, Justice. This is a document that was offered through Dr. Milburn, purportedly, but it's -- we don't have that affidavit.

THE COURT: Right. And you were going -- was this one of the documents that you were going to object to?

MR. BOYLE: Yes. Justice, all of the exhibits were objectable.

THE COURT: All right. And the objection would've been based on the same argument?

MR. BOYLE: It in part, as well as the lack of identifying the document, the source by which it came in, and the affiant's belief in the source. Those

were the principle objections, but they all go to whether these documents ought to be accepted. The exception with Dr. Milburn's affidavit being the *Health Protection Act* for the reasons Your Lordship identified.

THE COURT: Right, but do you deny that this is a government document?

MR. BOYLE: It appears to be a government document, Justice, but the use to which is going to be put can't be confirmed, given the lack of -- the representation that this was circulated in 2005.

THE COURT: The idea that this was in existence in 2005 cannot be confirmed, you're saying?

MR. BOYLE: Cannot be confirmed, cannot be confirmed whether there were additional updates or circulars at a later point in time, and therefore the relevance to a matter that arose in 2020 through present timeframe.

THE COURT: Okay. If it is a government document, you're saying that it's not relevant,

is that right?

MR. BOYLE: Yes.

THE COURT: It's really -- it's a question of relevance, or is it a question of reliability; it's hearsay? It's hearsay?

MR. BOYLE: I think it's a combination of all, Justice. There is an issue -- I think to Your Lordship's point, if we lead with relevance, what relevance is there to the sole issue before the Court today of mootness within this document?

THE COURT: All right. So let's go through this. So tell me why you say it's not relevant.

SUBMISSIONS BY MR. BOYLE

MR. BOYLE: The document appears to be a Guide to Health Protection Act and Regulations.

THE COURT: Yeah.

MR. BOYLE: The issue today is whether the matters put before the Court by the Applicants are moot, ---

THE COURT: Yeah.

MR. BOYLE: --- which simply involves the test set out in **Borowski**. Is there a lot of controversy; if not ought, the Court exercise its discretion balancing the three factors set out in **Borowski**.

THE COURT: Yeah.

MR. BOYLE: The contents of the Guide to *Health Protection Act* is not material to whether there is a live issue before the Court, or alternatively, whether an exercise of discretion should be granted.

THE COURT: Okay. All right. That's

the relevance issue. Is that the primary argument at this stage?

MR. BOYLE: Yes, Justice.

THE COURT: All right. All right, I'm going to hear from, then, Mr. Ray.

So Mr. Ray, the argument is that the only issue before the Court today is mootness. The Crown's argument that the request for judicial review should be struck because the matter is moot. And he says that this document from 2005 is not relevant to that issue because the issue really boils down to whether or not there's a live controversy, and if there is a live controversy, the matter goes on. If there isn't, he says it doesn't go on, and that this document doesn't speak to that concern. So he says it's irrelevant for today's purposes. If the matter proceeds, it may be -- have some other relevance down the line, but nothing for today.

What do you say in response to that?

SUBMISSIONS BY MR. RAY

MR. RAY: My Lord, as I understand, we are allowed to argue in the -- in response to the Crown's Motion for mootness, we are allowed to argue the live controversy affecting or potentially affecting the rights of the parties exists. Part of our -- or the main of our argument is based, in this matter, on the fact that one of our asked relief is a declaration that the CMOH acted in bad faith.

The one small section of the Guide to the *Health Protection Act* that I intend to use today goes to the argument of *prima facie* bad faith action, which we say would be alive controversy between the parties, as at the moment, my organization cannot take action against Robert Strang as an individual as he enjoys the limited liability protections given to him in section 12 of the HBA.

If this matter is adjudicated and if we are successful in that claim to relieve, it would have

a direct effect on our rights to sue the Respondent as an individual rather than sue the state of Nova Scotia in toto. Through the Guide to the Health Act, the very small section that I would be using, goes to that argument, says that *prima facie*, the impugned administrator acted in bad faith and as we say, *ultra vires* due to HBA.

THE COURT: So what's the limited purpose that you're using this document? What section are you talking about here?

MR. RAY: It is on, I don't know if you have the document in front of you?

THE COURT: I do, yeah.

MR. RAY: Okay. So it is on page 12 of 24.

THE COURT: Yeah.

MR. RAY: It comes under the heading, "Public Health Emergency," and it's right at the top of the page. It starts:

> This declaration that allows the CMOH to implement special measures; that is, the

> declaration of a public health emergency, which might include but are not limited to... (As read)

And this is the point, the only point I will use:

> ...implementing an immunization program (note that there is no ability to implement mandatory immunization in Nova Scotia, even in a public health emergency). (As read)

We say that goes directly to both *ultra vires* and bad faith, as this guide was issued to physicians so that they could follow the law as laid out in the *Health Protection Act*.

THE COURT: So I guess the other -- what you just said, you'd be relying on the introduction in page 6 as well.

Sorry; go ahead.

MR. RAY: Yes. Yes, My Lord, we may, but it was not the main section I was going to use.

THE COURT: Well I guess it's -- I realize it's not the main section, but you just said that

it was implemented to physicians for their -- and that's where that says that.

MR. RAY: I see, I see. Then yes; yes, I would, My Lord.

THE COURT: Okay. Anything -- I should say the Clerk just brought this to my attention, and I was having -- working off of electronic copies, but Mr. Boyle, we may -- we do have the tab. Do you have the Book of Documents there? The Applicants' Book of Documents in response to the mootness Motion?

MR. BOYLE: I believe I only have the ---

THE COURT: I'm changing gears a little bit, Mr. Ray, but just so you know.

MR. BOYLE: I think I've only got the digital version myself, Justice, the 1,700 or so page.

THE COURT: So the second tab, beginning at page 3 is the affidavit of Ms. Hipson. Now, it's unsworn, but then somebody has -- and I don't know

when this happened, but somebody has paperclipped an undated, but signed, *jurat*.

MR. BOYLE: I've not seen any *jurat*, Justice. I would have concerns about the fact that it would be undated.

THE COURT: So it's -- yeah. So what happened here, it looks as if -- so what I have here is I have a Book of Documents that was filed on November 22nd of 2024. And throughout it there are pages that are paperclipped to the documents in the -- and what are paperclipped to the documents are the signed -- the page with the signed *jurat*. There's paperclipped a Tab 1 with the Commissioner's signature at Tab 1, Tab 2, et cetera, et cetera.

MR. BOYLE: I've not seen that Justice.

THE COURT: Okay.

Can we give a copy of that to Mr. Boyle?

We'll come back to that in a minute. Let's just deal with -- let's just deal with this argument first.

So Mr. Boyle, what do you say about the document going in for those two limited sections, on page 6 under introduction purpose and page 12, I think it was, 12, 24.

MR. RAY: Page 12, My Lord.

THE COURT: Yeah, 12, 24. The beginning with the sentence at the top, "This declaration then allows the CMOH to implement special measures." And then the first bullet point about, "No ability to implement mandatory immunization in Nova Scotia."

REPLY BY MR. BOYLE

MR. BOYLE: Thank you, Justice. A few points to respond. First, Mr. Ray indicated that the argument he intends to make is that this process is necessary for the Applicants to sustain a personal action against the Chief Medical Officer.

THE COURT: A subsequent personal action, yeah.

MR. BOYLE: A subsequent personal action, separate from this proceeding, which is an important distinction. There is no evidence before the Court that that is intended that any such Application or Action has been filed. The first time, as noted in my written submissions, this issue has come up is within the course of this Motion. There's no argument before the court as to what prohibited the Applicants from proceeding with such Action. And I would note, as Your Lordship knows, throughout this proceeding, and as Your Lordship noted in the public interest standing decision, I have

raised issues about the choice of judicial review as a process before, and brought it to the attention of the Applicants that this was an available choice, should they desire to pursue it.

With respect to Mr. Ray's comment that these portions are relevant because they speak to public health emergency, it's not contested that a public health emergency was never declared under section 53 of the *Health Protection Act*. The orders were issued under section 32; it's a different section. So the relevance, again, is unclear on that basis.

Moreover, Mr. Ray also commented on desiring to speak to immunization. And, again, I covered this in my written submissions, Justice, but part of the Crown's concern about the Applicants needing public interest standing to pursue the scope of what they had initially filed was that they sought to pursue vaccination. There is no private interest for a corporate entity to speak to vaccine safety, efficacy, or anything.

The corporate entity was not affected by those portions of the order.

THE COURT: But wasn't this corporate entity precluded from meeting, for example, if they chose not to have a vaccine?

MR. BOYLE: Certainly, Justice, but portions of the Order relevant to that would be checking for proof of vaccine within a limited period of time. Whether an individual is vaccinated or not did not prohibit online gatherings or other forms of gatherings.

The issue that seems to be the thrust of the entire judicial review is vaccines, and that is beyond the scope of the impact the corporate Applicant would have had.

THE COURT: So -- and just so I'm clear, you're saying that the -- this corporation, whose mandate includes challenging social advocacy, I guess, if I could -- for lack of a better word, or advocacy with respect to these type of issues, you're saying that it's

-- it was not affected by the mandatory vaccine requirement?

MR. BOYLE: Not directly, and I think there's a difficulty in what constitutes a mandatory vaccine requirement. The Public Health orders at different points in time allowed certain activities for those who were vaccinated versus those who were not. The corporate entity was not directly affected as an entity; its members may have been. And this is the point that we've made consistently, and that is, to my understanding, part of the reason that the minor Applicant was brought into the proceeding, to address some of those issues when they were applicable, when they were live issues.

But the corporate entity's mandate, as you've described it, Justice, ---

THE COURT: That may be the wrong word, it's just ---

MR. BOYLE: Well, the social justice aspect of the organization's intent and purpose, let's

say, ---

THE COURT: Yeah, yeah.

MR. BOYLE: --- was, to the Respondent's mind, the subject of the public interest standing Motion that a broader view of certain restrictions in the context of the Order could be considered.

Now on that point, Justice, we're getting a little bit into oral argument for later.

THE COURT: Yeah, the argument; yeah, I understand.

MR. BOYLE: But the -- I think it's of material at this point to note that there are, to my mind, two levels to the *vires* argument that Citizens Alliance would be bringing. There's the overarching question of whether a Public Health order was authorized under the statute at large. There would also be a *vires* question in a narrower scale with respect to the reasonableness under section 2 of the *Health Protection Act* of certain

restrictions at certain defined points in time. And that is where the public interest standing versus private interest standing distinction comes into focus; was there an impact of an individual restriction at an individual point in time? The corporate Applicant has not defined clearly which restrictions of which points in time would be subject to review. And that has, consistently since December of 2021, been a concern of the Respondents, that reviewing each individual restriction in each iteration of the order for the period October 2021 through July 2022 would be a massive undertaking. And so that's why the Respondents had sought to keep the scope clear; what interest does each Applicant have and what is the extent of the review that's permissible with the standing available?

THE COURT: Okay.

Mr. Ray, just one additional question. Is the -- the parts of this document that you look, page 1 of 24 and page 12 of 24, is it really just to highlight

the fact that if you succeed at the end of the day that -- and you get the declaration of bad faith that you're looking at -- that you're looking for, then that will allow you then to proceed with a more targeted proceeding against Dr. Strang individually? Is that the relevance of it, sort of a cascading impact?

MR. RAY: Well, in the present -- the present Motion, answering the Respondent's Motion to strike, ---

THE COURT: Yeah.

MR. RAY: --- we believe that we have the right to argue that he acted in bad faith. And that adjudication on that matter, we say, is a live conflict because it will directly affect both parties' rights. It will affect our right to directly pursue the man who did the wrong, rather than pursuing every taxpayer in Nova Scotia.

THE COURT: Right.

MR. RAY: And it will certainly have

an effect on the rights of Robert Strang, the Respondent, ---

THE COURT: Right.

MR. RAY: --- as his lawyer will not -- will not then be paid by the Crown.

THE COURT: Right. But whether or not he acted in bad faith or not, this goes to the argument that, well, you would say maybe he acted in bad faith because this suggests that there's no ability to implement a mandatory immunization program, even in a public health emergency. So it goes to that. But your argument that I need to be able to -- this is a live controversy because part of my argument is bad faith, and it's a live controversy because that controversy is going to continue; it's going to remain alive if you decide that there was bad faith, there are further implications on that to my organization.

MR. RAY: Yes, My Lord.

THE COURT: But that argument can be

made without that evidence. In other words, that's the impact of the litigation generally, isn't it?

MR. RAY: Yes, My Lord, This was brought in by us, simply to provide evidentiary material for the arguments in our brief.

THE COURT: Okay. In other words, just to suggest that it's not just -- it's not sort of pie in the sky or it's not completely sort of imagined, you're trying to refer to government.

MR. RAY: Exactly, My Lord. I had read in -- it is 38 of the Nova Scotia Rules in here, ---

THE COURT: Yeah.

MR. RAY: --- that enjoins me that if I am to make an evidentiary argument that I should have the evidence in my pleadings.

THE COURT: Yeah, yeah. I don't think you need an evidentiary basis to make the argument that I'm looking for -- or my organization is looking for a finding of public faith, a bad faith at the end of the

day. That is a live issue which is not moved because a determination of that issue will allow you -- whether or not it's a successful argument or not, will allow you to then pursue more meaningful redress from the people that you say are responsible.

MR. RAY: Yes, My Lord, it would impact ---

THE COURT: But I don't think you need the evidence in support of that argument; that's an argument that you say that's what it's live issue, I guess is my point.

MR. RAY: It is evidence meant to strengthen that argument, My Lord.

THE COURT: Yeah, okay. Okay, thank you, Mr. Ray.

So as I said, the public -- the *Health Protection Act* is in, no question about it. Based on what I've heard, and I know -- and I appreciate Mr. Ray confining what he says is relevant to this exhibit, to Dr.

Milburn's affidavit. And the exhibit I'm speaking of is a Guide to the *Health Protection Act* and Regulations, dated the fall of 2005.

It may be relevant to other issues, I'm not certain -- I don't believe it's relevant to this particular issue. But having said that, I am going to allow, obviously, Mr. Ray to make the argument as to why the bad faith allegation is a live controversy. I don't -- I'm not -- and I don't believe that this particular, the evidence in this document precludes him from doing that. And I will also say that Mr. Ray has sought cross-examination of the Crown witness, and the Crown witness can be asked about this Regulation in cross-examination as well. I'm not saying that it's irrelevant for that purpose. Okay, Mr. Boyle?

MR. BOYLE: Certainly, Justice. Thank you.

THE COURT: All right.

MR. RAY: My Lord.

THE COURT: Okay. So now let's get back to Ms. Hipson's affidavit. We don't have evidence from Dr. Milburn -- affidavit evidence from Dr. Milburn, so that affidavit is not in, but subject to the comments I just made about the exhibits.

So Mr. Boyle, have you seen what I now see has been paperclipped? I don't know how this all occurred, to be honest with you, because it's not stamped on the day in which we received signed the signature pages. But have you seen what's happened here?

MR. BOYLE: I do, Justice, and I see that -- I've not reviewed each and every tab that are staggered throughout this document, but it appears the exhibit pages are -- at least the first few are dated and signed.

THE COURT: I think what happened is I think they -- I think they slip sheeted in on the exhibit pages a separate -- a new copy of each exhibit, because you'll see each one has a Tab 12 cover page and a page.

For instance, you go to Tab 10, you'll see there's a page 57, Tab 10

MR. BOYLE: I -- 57.

THE COURT: And there's another page 47, Tab 10?

MR. BOYLE: Yes.

THE COURT: So I think what they did is they filed an unsigned copy of this book, as best I can tell, and then they came in with a signed, undated copy sworn by Michelle Christie, and they just slip sheeted in the signed components of the affidavit.

MR. BOYLE: Right.

THE COURT: Somebody slip sheeted it in. I don't know who did it. I don't think they originally filed the paperclip copy, but I'm ---

MR. BOYLE: That would make sense to me, Justice, based on what I'm saying.

THE COURT: So I don't think -- I mean, I know it's undated, the first -- the *jurat* is

undated, but then Ms. Christie does actually date the exhibit stamp pages November 22, she just doesn't date the *jurat* section.

MR. BOYLE: Yes. Justice.

THE COURT: And just to not use too much (inaudible due to mumbling) when we refer to the *jurat*, Mr. Ray, do you know what that means? Do you ---

MR. RAY: No, I do not.

THE COURT: Okay. So *jurat* means the -- at the end of the affidavit, you'll see it says, "Sworn before me at Shelburne"? This is the second page of Ms. Hipson's affidavit.

MR. RAY: Okay, yes.

THE COURT: Everything from that line down is called -- is basically it's all called the *jurat*. It's essentially the formal word for saying that an official formally took somebody's oath and bound their conscience to the truth of the contents in that document.

MR. RAY: Yes, My Lord.

THE COURT: Okay? So I guess I can tell you -- and Ms. Hipson's here today, is that right?

MR. RAY: No, she is not. Oh, she's -- yeah, she's on their computer, I suppose, but she's not here ---

THE COURT: Oh, I see. But she's not here. All right. But I don't think you were looking to cross-examine her anyway, is that right, Mr. Boyle; it's just admissibility arguments?

MR. BOYLE: That's right, Justice.

THE COURT: All right. So now that we have a signed copy here, what do you say, Mr. Boyle, about admissibility of Ms. Hipson?

MR. BOYLE: Well, Justice, there is the concern about the lack of date, but the signatures appear to match throughout, and it appears the exhibit pages are all properly marked. So to move forward today, I'm prepared to accept the affidavit as presented here and submit the arguments I had intended on that basis.

THE COURT: Okay. So let's go through that, then. Let's go through her affidavit. And there's challenges to the admissibility here as well, Mr. -- or some of this information, Mr. Boyle?

MR. BOYLE: Just the -- just of the exhibits and certain of the paragraphs, Justice.

THE COURT: Okay. So what are the specific concerns about this affidavit? Let's go through those.

MR. BOYLE: All right. So the concerns are primarily with the exhibits; again, like with Dr. Milburn's, not individually identified within the body of the affidavit. The exhibits also contain what appear to be in -- something that appears intended to be additional evidence at the beginning of each document. So it's not clear in some cases where the information that's intended to be the exhibit begins, and material that might better be presented in the body of the affidavit ends.

Just as a particular example, Justice,

at Tab Exhibit 3, there's a Freedom of Information document number 2021-01575 HEA, ---

THE COURT: Yeah.

MR. BOYLE: --- followed by what appears to be something I'm assuming Ms. Hipson added in, ---

THE COURT: Yeah.

MR. BOYLE: --- which continues onto the second page.

THE COURT: Yeah.

MR. BOYLE: And then there's a document that is dated December 15th. It's indicated to have been sent via email, but this document doesn't contain headings like some of the other correspondence does in the file. For instance, at Exhibit 6, there's Nova Scotia Health headers and such. So it's not clear if this was a letter from an email; if it was a letter sent out. There are concerns about where the demarcations would lie. There's ---

THE COURT: Are you talking about Exhibit 6 now, or where are you?

MR. BOYLE: Well, Exhibit 6 is just an example where there's a header to the letter, ---

THE COURT: Right.

MR. BOYLE: --- which is missing here. And my concern is that where it appears Ms. Hipson may have been writing additional context within the exhibit itself, what additional edits had been made. It's not clear at all the extent.

I would also note that, once again referring to Exhibit 3 just by way of example, the first apparently operative page there indicates at the bottom, "Responsive records have been located and are attached." Those are not attached, so the document is not complete.

THE COURT: Yeah.

MR. BOYLE: I have concerns about, again, edits that are not identified or explained to the contents of the affidavit. And moreover, where we see

what is largely opinion and argument surrounding those matters in the exhibit, not even in the body of the affidavit. So I ---

THE COURT: So I want to be surgical about this, though, Mr. -- I don't want to just say it's all out and just assume that all of the problems are scattered throughout the whole document, so the whole document becomes contaminated. I know that's a bit laborious given that -- because I take your point that each exhibit seems to begin with Ms. Hipson's summary of what she did to ask for the information and then what she received back from the organization. But I don't want to just -- and I know she did that in every case, but is there --are there specific redactions, or are you saying that it all needs to go because it all has the same problem?

MR. BOYLE: I think it does, Justice, simply because if we were to be surgical and remove only the commentary that's improperly added at the beginning of

each exhibit, ---

THE COURT: Yeah.

MR. BOYLE: --- we're still not clear how the document has been modified, given that there are references to materials attached which are not attached.

THE COURT: Well, like -- but that's not in every case. So for example, ---

MR. BOYLE: No.

THE COURT: --- what's wrong with Exhibit 1?

MR. BOYLE: Yes. Sorry. And certainly, Justice, we can go through individually and review that if it is clear that the letter says there's no information, ---

THE COURT: Yeah.

MR. BOYLE: --- and that's the end of it, that would be fine.

THE COURT: Right. So then if we go

to Exhibit 2, I agree with you, we have, "Responsive records have been located and are attached," and they're not attached. And instead what we seem to have is Ms. Hipson summarizing what she received but doesn't attach ---

MR. BOYLE: Right.

THE COURT: --- what she received.

MR. BOYLE: Which does not form sworn evidence in the body of the affidavit and ought not be admissible on that basis.

THE COURT: All right. And we have the same problem with Exhibit 3 where Ms. Hipson summarizes what she received but doesn't attach what she received.

MR. BOYLE: Yes. And, Justice, if we can go back to Exhibit 2 just quickly, the letter dated August 11th, this is an example where it was Nova Scotia Health and Wellness directly responding this -- the examples I gave before related to Nova Scotia Health. But

this is more the presentation in Exhibit 2 that we would expect to see from a government response which goes to my -- there ought to be a header; like, the Nova Scotia Health and Wellness Office of Deputy Minister rather than in certain other letters that we come across, there is no header, so ---

THE COURT: What do you mean by a header?

MR. BOYLE: You have the August 11th, 2021 letter, the Nova Scotia Health and Wellness logo at the top and the contact information, ---

THE COURT: Yeah.

MR. BOYLE: --- and the signatures. Now, in subsequent letters that we'll come to, Justice, there are letters that just don't contain that. So it's not clear.

THE COURT: All right. So we'll come to those, then?

MR. BOYLE: Yeah.

THE COURT: All right.

MR. BOYLE: I just wanted to flag that by way of example, Justice.

THE COURT: I agree. All right, I take your point.

So we have Tab 3 and I have the same -- it doesn't have the header that you say at the top.

MR. BOYLE: Right.

THE COURT: But it does have an Associate Deputy Minister's signature on the second page.

MR. BOYLE: It does, but ---

THE COURT: So I'm not sure I -- you know, I don't want to be too precious about it. I mean, I'm not saying that it's irrelevant or that it's immaterial, but I think the more significant concern is the notion that there are responsive records which are supposed to have been attached but they're not.

MR. BOYLE: Yes, Justice. So it's not sufficient, I would submit, to rely upon summaries in the

body of an exhibit that have not been sworn as evidence, ---

THE COURT: Right.

MR. BOYLE: --- as a form of evidence; that's no substitute, Justice.

THE COURT: So we go to Tab 4 where it just says, "After file search we have located no records."

MR. BOYLE: Yes. That is a simple no records, Justice.

THE COURT: Right.

MR. BOYLE: But again, I note it's a header issue.

THE COURT: Yeah. What is the prejudice on the headers? It just -- I don't know if it's real. I don't know if it's the real document.

MR. BOYLE: Right. And as a more fundamental point, Justice, none of these -- if we return to the body of the affidavit, ---

THE COURT: Yeah.

MR. BOYLE: --- at paragraph 5, Ms. Hipson states:

> The source of all data and information in this affidavit are from Freedom of Information requests and responses for official publicly available government data obtained through the Nova Scotia Provincial FOIPOP office. (As read)

It's not clear if these are all obtained by her or where she got them because she also refers at paragraph 7 to the:

> Starting submitting FOI requests, primarily with the Department of Health and Wellness, to obtain government and hospital records related to COVID-19 between 2020 and present day. (As read)

So did these come to her; did they come to her from another source? It's just not clear, and she didn't demarcate that.

THE COURT: Well, she didn't put that in her affidavit, but if you read the emails or if you read the letters that she attaches as exhibits, there's not a mystery as to who is asking for this document.

I just don't want to become so technical that we get bogged down on technicality and we lose the forest for the trees, frankly.

MR. BOYLE: And I appreciate that, Justice.

THE COURT: If there's a real prejudice that you're referring to, then I'm happy to talk about it.

MR. BOYLE: That's fair, Justice. I'm happy to -- I don't expect there is a prejudice, there's just a -- there are several issues.

THE COURT: Yeah.

MR. BOYLE: And I just want to ensure that they are all identified.

THE COURT: Okay, that's fine.

So if we go, if we continue on to Exhibit 5 and it says, Exhibit 5 before I received back, here again "Attached record," but nothing's attached.

MR. BOYLE: Yes.

THE COURT: All right. So that's another concern, that we have evidence that's being summarized but not being included in the affidavit itself.

MR. BOYLE: Yes, Justice.

THE COURT:

Exhibit 6, we have summarized -- we have the header here, the summary of the request. We have, "I've withheld personal information, so this information cannot be disclosed." She says:

> I'm protecting privacy by changing all numbers less than five to under five in the attached spreadsheet. (As read)

So again, we have a spreadsheet that's attached that's not attached.

MR. BOYLE: Yes. And one further point here, Justice; this is a Nova Scotia Health response. Nova Scotia Health is a separate entity to government. So it's not clear what relevance a response from Nova Scotia Health would have to matters involving the Respondents named in this proceeding.

THE COURT: Okay. But I think probably, for my purposes, the more significant concern is you're being asked to accept Ms. Hipson's summary in circumstances where she didn't actually attach the information that she's summarizing.

MR. BOYLE: Yes, Justice. And the information as summarized is not sworn evidence in the body of the affidavit with the *jurat* at the end.

THE COURT: Yeah.

MR. BOYLE: I have a concern about that presentation.

THE COURT: Yeah, I understand that. That -- I mean, I appreciate the technicalities of it. I think if I was going to rank them in terms of seriousness, the fact that you're being asked to accept documents that aren't -- could have been attached and aren't, and it’s an incomplete document, therefore, is a more serious one. I don't want to become so technical that the *jurat* doesn't bind her conscience to the truth of what she was doing.

And then we kind of get into that argument, frankly, but I'm not sure we need to go there.

MR. BOYLE: Certainly, Justice. Thank you.

THE COURT: All right, so Exhibit 5 and Exhibit 6, now Exhibit 7.

MR. BOYLE: Yes, exhibit ---

THE COURT: Again, she received something back and it didn't -- hold it now. Oh, Exhibit 7 is we just -- we couldn't find anything.

MR. BOYLE: Yes. And again, Justice, this is a Nova Scotia Health document, not a government document that would've been available to the Respondents, necessarily.

THE COURT: Yes. Okay, Exhibit 8?

MR. BOYLE: Similar concerns, Justice. Provided combined totals by month, et cetera, and the material’s not provided, and a Nova Scotia Health document.

THE COURT: Right. Exhibit 9? (Inaudible due to away from microphone) copy of records. They're refusing access; talks about being continued in -- okay. What's the concern about Exhibit 9; is it just the header?

MR. BOYLE: Just the summaries, Justice, the references to material which is in the public domain. There are websites listed, but none of the information that would be obtained from those websites is available. It would've been accessible to the recipient of the request.

THE COURT: But if it's just the fact of the matter that the Government of Canada Resources and whose resources, WHO's resources can be found on a particular website, if that's the issue -- or if that's the response, that's the response.

MR. BOYLE: I'm sorry?

THE COURT: If the response is, "If you want more information, go to these websites," that's

all that the information that this woman is ---

MR. BOYLE: Yes.

THE COURT: --- testifying to.

Okay, Exhibit 10?

MR. BOYLE: "Responsive records have been located and attached," but they're not attached.

THE COURT: Right. Exhibit 11?

MR. BOYLE: "Materials are attached" and not attached.

THE COURT: Okay. And 12?

MR. BOYLE: "Responsive records located and attached"; not attached.

THE COURT: Yeah. Thirteen (13)?

MR. BOYLE: That appears to be reasonable, Justice:

> After a file search, no records located. Unaware of any department or agency holding such records. (As read)

So subject to previous concerns, that's ---

THE COURT: Yeah.

MR. BOYLE: Yeah.

THE COURT: Exhibit 14, it refers to documents ---

MR. BOYLE: Yeah, which are not attached.

THE COURT: Exhibit 15?

MR. BOYLE: "Records enclosed"; not attached.

THE COURT: Exhibit 16?

MR. BOYLE: "D. Identified copies of disclosure letters attached"; not attached.

THE COURT: No. Seventeen (17)?

MR. BOYLE: "Responsive records located and attached"; not attached.

THE COURT: Okay. All right. Thank you Mr. Boyle, appreciate it.

MR. BOYLE: Thank you, Justice

THE COURT: Mr. Ray, the primary

concern -- I mean, we have we have two primary concerns. One is that Ms. Hipson would include in her exhibit page a summary of what she asked for and then a summary of what she received instead of actually just attaching what she received.

MR. RAY: The documents, yes, My Lord. I'm given to understand that the documents up -- that the attachments were filed electronically on the Titan file, but it ---

THE COURT: We don't have Titan.

MR. RAY: I understand, My Lord.

THE COURT: The Court doesn’t have Titan.

MR. RAY: So I mean, if the evidentiary document is not attached, we will accept that portion to be struck, obviously.

THE COURT: Okay. Okay, thanks, Mr. Ray.

All right. So for the purposes of the

hearing, in my view, where an Affiant attaches a document to be introduced in evidence at a hearing, the entire document needs to be attached, particularly when the information that's attached says, "Here is a response from Freedom for Information request," and it's actually the attachment that is a critical part of the document.

So where that has occurred in Ms. Hipson's affidavit, I'm not going to allow the evidence in. So Exhibits 2, 3, 5, 6, 8, 10, 11, 12, 14, 15, 16, and 17 will be struck.

With respect to the remaining exhibits, they are 1, 4, 7, and 9. Mr. Boyle makes, I think, basically three arguments, maybe four. The first is that it's irrelevant. The ones that have a Nova Scotia Health header on the response is irrelevant because it's not a government agency, or it's a different government agency. The second argument is that the -- some of them don't have any headers at all. So the question is they're whether or not they're authentic. The third is -- and the

third is that the -- each one of those exhibits also contains a summary from Ms. Hipson as to what she requested and what she received.

In my view, I'm going to allow those exhibits in. The issue around Nova Scotia Health and the header issue is a technical issue. It may go to weight, but it's not going to go to admissibility, in my view. The fact that Ms. Hipson didn't technically identify the exhibits in the way that you would normally see them under the Rules, it's a concern, but it doesn't, in my view, create a prejudice that would -- that cannot -- that is so significant that it should be struck. Not that any prejudice -- not that that -- not that the Rule should be ignored, I just don't think in the circumstances that that’s a sufficiently strong or compelling argument to strike them.

With respect to the summary at beginning of each one, these are ones where no information was received back, so Ms. Hipson's commentary are neutral

to that effect; she's not giving any opinions.

MR. BOYLE: I'm sorry, Justice, what was that?

THE COURT: Ms. Hipson's comments are neutral; she's not giving any opinions on what she received because she didn't receive anything, unlike the ones where she was -- where there was records attached.

So I'm going to allow Exhibits 1, 4, 7, 9, and 13 and the rest of the exhibits are struck.

Is there any other part of her -- the main body affidavit that you were challenging Mr. Boyle? Specific sections of the -- of her affidavit? Paragraphs, I mean.

MR. BOYLE: Yes, Justice. I just wanted to clarify one point from Your Lordship's judgment. Did you mention in R-1, 4, 7, 9, and was it 13, did you mention?

THE COURT: One (1), 4, 7, 9, and 13.

MR. BOYLE: And 13. Okay.

THE COURT: Let me just make sure. One is -- I believe one is one of the ones where she asked for information and, yeah, they're closing the file, they couldn't find any records. Yeah.

MR. BOYLE: Yeah, okay. Okay. And the, the summaries you mentioned, Justice, are neutral, so they are remaining in those five exhibits?

THE COURT: I'm going to allow them to remain as part of the -- as part of the affidavit and as part of her sworn evidence.

MR. BOYLE: Okay, thank you, Justice.

With respect to the balance of Ms. Hipson's affidavit main body, ---

THE COURT: Yeah.

MR. BOYLE: --- just to confirm, Justice, the version of the affidavit before you has nine numbered paragraphs?

THE COURT: Nine numbered paragraphs, and number nine -- paragraph number nine has an (a) and a

(b) subparagraphs.

MR. BOYLE: Perfect. Thank you, Justice. That's fine.

So it's only paragraph 8 that I would challenge, then, Justice. Paragraph 8 reads:

> The data received back from the government in Freedom of Information responses does not agree in material fact with what Dr. Robert Strang said publicly. (As read)

Respectfully, that constitutes opinion or argument and ought to be struck on that basis.

THE COURT: Yeah. And the other issue I have with that is it does -- it's not really clear to me -- and this might go to weight, but it could go to admissibility, what it is that Dr. Strang said publicly that's contradicted by the information? There's no details around what Dr. Strang said that would be controversial or contradictory, and it's not really clear.

The other problem, of course, given my findings with respect to the exhibits, question mark whether or not the contradictions were in the exhibits

that have been struck.

MR. BOYLE: Right, Justice.

THE COURT: So Mr. Ray, that's the arguments you have to confront.

MR. RAY: On ---

THE COURT: Paragraph 8; we're talking about paragraph 8 now.

MR. RAY: Yeah. On paragraph 8 we have no objection if My Lord see fit to strike that specific paragraph.

THE COURT: All right. Then I think I will strike paragraph 8 for the following reasons. First, it's not only hearsay because she's attesting to what Dr. Strang said publicly, but it's sort of uncorroborated hearsay because we don't even know what the hearsay was supposed to say, we don't know what Dr. Strang was supposed to have said. And that's a problem, number one. And once you have that problem in place, it's hard to provide any weight to Ms. Hipson's testimony that Dr.

Strang was saying contradictory things when she doesn't identify what Dr. Strang was supposed to have said in the first place. So it's -- it has no relevance to the matter before me and its weight is -- and it's inadmissible as hearsay, and it's weight is so tenuous as to almost be meaningless in the circumstances. Not -- and I don't mean that as a criticism of Ms. Hipson, it's just if she's going to compare what Dr. Strang said to what she received, we need to know what Dr. Strang said.

MR. RAY: Yes, My Lord.

THE COURT: Okay. Are there any other preliminary evidence before we get to the cross-examination?

MR. BOYLE: No, Justice, thank you. I just reviewed the neutral statements and the tabs that Your Lordship indicated would constitute sworn evidence. I have no concerns with that, and we're prepared to proceed.

THE COURT: All right, thank you.

Okay, so your witness is here, then, Mr. ---

MR. BOYLE: Yes, Justice. I believe a Deputy can collect her.

THE COURT: Okay. And I know that you're -- you can't necessarily, Mr. Ray, predict how long the answers might be and how the flow might go, but do you have a sense as to how long your cross is going to be?

MR. RAY: I don't believe my questioning will take more than about 15 minutes, ---

THE COURT: Oh, okay. Okay, great.

MR. RAY: --- My Lord.

THE COURT: Thank you.

And just to be clear, what I said before, before the witness comes in, if you want to put that document from Dr. Milburn's affidavit, if she can identify it or authenticate it, you're allowed to do so. But if she says no, you're stuck with her answer.

MR. RAY: My Lord.

MR. BOYLE: Justice, just a point to

clarify; do you prefer the affidavit be marked as an exhibit once confirmed or, ---

THE COURT: I think so.

MR. BOYLE: Yes, okay.

THE CLERK: You've a choice in how you promise to tell the truth. You can swear an oath on a holy book, Bible, or affirm; which do you prefer?

MS. WALSH: A holy book.

THE CLERK: Bible?

MS. WALSH: Yeah.

TARA WALSH, Sworn, Testified:

THE CLERK: Can you please spell and state your name for the record?

THE WITNESS: T-a-r-a, W-a-l-s-h; Tara Walsh.

THE CLERK: Okay. And just speak into the microphone, please.

THE WITNESS: Okay, thank you.

THE COURT: Good morning, Ms. Walsh.

THE WITNESS: Good morning.

THE COURT: Is there a glass of water there that -- do you have a glass of water?

THE CLERK: Yeah, but I can go get her a glass of water.

THE COURT: Yeah, could we maybe just...?

THE CLERK: Yeah, for sure.

THE COURT: Thank you.

THE CLERK: No problem.

And while we're waiting for a glass of water to come back, I just wanted to make the -- when we talked about it on the phone, but the Crown is relying on Ms. Walsh's affidavit. There was an earlier Motion filed, probably almost two years ago, Vanessa Chouinard swore an affidavit. The Crown is not relying on that affidavit for the purpose of this Motion.

MR. BOYLE: That's correct, Justice.

THE COURT: All right.

You understand that as well, Mr. Ray.

MR. RAY: Yes, My Lord.

THE COURT: Okay. So that evidence I will not take into account. Whatever Ms. Chouinard might or might not have said, I won't be taking that into account.

(SHORT PAUSE)

THE COURT: Thanks very much, Madam Clerk.

Okay, good morning again, Ms. Walsh.

Mr. Boyle?

MR. BOYLE: Thank you, Justice.

DIRECT EXAMINATION BY MR. BOYLE

Q. Ms. Walsh, I'm presenting a document to you. Can you please identify this document?

A. Yes, this is my affidavit sworn October 7th, 2024.

Q. Can you turn to the second page of this document?

A. Yes.

Q. There should be some signatures (inaudible due to away from microphone)?

A. Yes, that's correct.

Q. Can you identify the signature on the witness line on that page?

A. Yes, that is my signature.

Q. And you confirm that this is the document you swore on October 7th of this year?

A. Correct, yeah.

Q. And there are three exhibits attached to this affidavit.

A. Yes.

Q. Does the affidavit remain true and correct, to the best of your knowledge?

A. It does, with the exception of paragraph 8, I believe. I stated that the first iteration of the Public Health order was issued verbally by Dr. Strang on March 22nd. And in fact, I've come to realize that the first iteration was issued verbally by Dr. Strang on March 15th.

Q. So you would amend paragraph 8 as presented in your affidavit by changing the date of March 22nd to March 15th -- sorry; March 22nd of 2020 to March 15th of 2020.

A. Yes, that's correct.

Q. Other than that change, does your affidavit remain true and correct, to the best of your knowledge?

A. Yes, it does.

Q. Thank you.

MR. BOYLE: I tender the witness for cross-examination, Justice.

THE COURT: Thank you.

Mr. Ray?

MR. RAY: My Lord.

CROSS-EXAMINATION BY MR. RAY

Q. Hello Ms. Walsh.

A. Hello.

Q. Thank you for being here today. Preliminarily, I would just like to ask a couple of questions on your affidavit at number 1, paragraph 1 of your affidavit where you list your employment with the government.

So in your affidavit you state that:

> At the time of the first Public Health order relating to COVID-19 was issued on March 2020, I served as Managing Director, Communications in Nova Scotia. I then served as Special Advisor, Health Transformation Office from May 2022 till September 2023. (As read)

So my first question there is, do you manage your own LinkedIn page, ma'am?

A. Yes, I do.

Q. Okay. So would it be precise to say, then, from March 2020, so from the first iteration of the order, until May 2023, which would've been the time

that the full orders were dropped, you were the Managing Director for the COVID-19 Communications response specifically?

A. Until May 2022, I was the Communications Director for the COVID response.

Q. So from the first iteration you were -- you were, indeed, the person responsible for the government for all its COVID-19 communications, let's say?

A. That's correct, yes.

Q. Thank you, ma'am.

So in that position, would you, madam, have had -- would you have knowledge of any -- of every major pronouncement made by the Government of Nova Scotia in relation to COVID-19? You say in your affidavit at para -- ah, there we go. At number 6 of your affidavit, you say that:

> The Province of Nova Scotia was under a provincial state of emergency from March 22nd, 2020 until March 21st, 2022. (As read)

Do you have any direct recollection,

or did you participate in the announcement of a public health emergency, issued by the Minister of Health? And if so, at what point during the pandemic (inaudible due to mumbling) would that have occurred?

A. Yes. So in my role as the Managing Director of Communications, I would've been on point to help the government communicate that information, once the decision was made, to Nova Scotians.

Q. All right. So on or about what date or what month did you supervise the communication to the population of Nova Scotia that the Minister of Health had declared a public health emergency?

A. So there was no public health emergency declared under the *Health Protection Act*. There was a state of emergency declared under the *Emergency Management Act*. I believe I stated in my affidavit that that occurred on March 22nd, 2020.

Q. Okay, thank you, ma'am. And so was it under the *Emergency Management Act*?

THE COURT: I'm sorry, Mr. Ray.

You say March 22nd of 2020?

THE WITNESS: Yes.

THE COURT: But didn't you correct that? Am I -- is that something different?

THE WITNESS: Yeah.

THE COURT: Am I talking ---

THE WITNESS: Oh, apologies; yes. The verbal order was March 22nd, the actual written iteration of the Public Health order was March 23rd, 2020.

THE COURT: March 23rd?

THE WITNESS: Yes, but I believe the state of emergency was declared on March 22nd, 2020.

MR. BOYLE: Just to clarify, I think there are two issues here; there's the state of emergency under the *Emergency Management Act* ---

THE COURT: Yeah.

MR. BOYLE: --- and the dates associated with that versus public health emergency, which

I believe Mr. Ray is questioning on just to ---

THE COURT: Oh, I see.

MR. BOYLE: --- keep those ideas distinct, Justice.

THE COURT: Thank you.

Sorry, Mr. Ray. So I cut you off, but you were talking about a declaration of public health emergency, and I think the witness indicated that there wasn't a declaration of a public health emergency. There was a state for emergency declared.

MR. RAY: That's correct, My Lord.

BY MR. RAY:

Q. So madam, in issuing -- so you would've been directly involved in the formulation and issuing of Robert Strang's Public Health Orders, yeah?

A. I would've been directly involved in how those orders were communicated to Nova Scotians via speaking remarks, press releases, website content, social media posts, et cetera, not the wording of the orders

themselves or the decisions behind the orders.

Q. Okay. So were the orders of Dr. Strang that you did communicate to the public, were they then issued under the *Emergency Management Act*?

A. No, the orders of Dr. Strang were issued under the *Health Protection Act*.

Q. And can you tell me; do you know what section of the *Health Protection Act* authorized those orders?

A. Yes, I believe section 32.

Q. Thirty-two (32). Thank you.

So we have established that indeed there was not a public health emergency, but an emergency under the *Emergency Management Act*, whose section 5(a) describes the striking of an Emergency Management Committee. Would you have been part of that committee?

A. No, I have no knowledge of that committee.

Q. You have no knowledge of that

committee? You never received communications from the f(a) constituent committee; you received your instructions, I assume, from Dr. -- or from Robert Strang; yes?

A. Yes, that's correct.

Q. Okay, ma'am, thank you.

Now, I think you've already answered it, but just to be very clear, so you -- it is your -- you are saying that neither you nor any other communications officer had any direct role in the actual generation of any Public Health Order?

A. That's correct.

Q. Thank you, ma'am.

So in your position you would've had the direct role in the issuance of the October 4th iteration of the Public Health Order and its attached protocol; is that correct?

A. Insofar as communicating it to the public, yes.

Q. Right. But you would have knowledge, generally, of its contents, ma'am?

A. Yes, correct.

Q. Thank you.

THE COURT: What date was that again, Mr. Ray? October 4th, did you say?

MR. RAY: October 4th. The October 4th iteration of the Public Health Order, which is -- for clarity, which is the iteration my organization is concerned with. We do not want to talk about masking and social distancing and all the rest of that. It is the iteration of October 4th, its embedded protocol which created what we will call a vaccine mandate.

THE COURT: Thank you.

BY MR. RAY:

Q. All right, so ma'am, I'm just going to ask you -- I'm going to -- I'm going to read you a section of the embedded protocol of the October 4th Order, and I'll ask you these questions again after I read

this section, but just so you know what I'm getting -- wandering toward here.

Okay. So the question I will ask -- actually, it's just one. So the question I will ask you afterward is; can you explain, as a senior government official, well-experienced in the communication field, what exact message the government would hold ---

THE COURT: Sorry, just a second. We have an objection.

MR. BOYLE: I think there's a little bit of editorializing in the question there. I recommend it be rephrased in terms of "Well-versed," et cetera, "Well-experienced"; that kind of language I don't believe has been ---

THE COURT: Yes.

MR. BOYLE: --- established under questioning.

THE COURT: So I mean, Mr. Ray, it just -- you don't need to -- part of the concern is when

you add a bunch of introduction into your question, if part of the objection becomes, well, is she adopting your characterization or not, when you haven't really put it to her and we don't even know it's relevant. So it's probably better practice, unless it does become relevant, just to ask the question without the -- without the rest of it.

MR. RAY: Okay.

BY MR. RAY:

Q. So the question simply is what exact message would you feel the government would hope these passages that I will read next communicated to the population and to our organization? And the passage is, and I quote:

> It will be important for businesses and organizations to remind patrons that the proof of vaccination requirement is the law in Nova Scotia under the Health Protection Order issued by the Chief Medical Officer of Health. (As read)

So again, the question there is what exactly should my organization take from that statement?

MR. BOYLE: Justice, I think we're being asked for an opinion. It's not clear. I think Ms. Walsh has been clear she wasn't involved in drafting the language of those Orders. And speaking to the context of that message is a little problematic.

I'd also wonder whether Mr. Ray has a copy of the document that Ms. Walsh can refer to for further context if necessary.

THE COURT: Well, I think he can speak to -- because I understand that you're reading from a press release, aren't you, or ---

MR. RAY: No, My Lord. I am reading from the embedded protocol of the October 4th Order. The October 4th Order did not actually, in its body of the Order, set up the conditions for that mandated us to violate our members' rights and do various other things.

THE COURT: Right, right.

MR. RAY: That was contained in a protocol attached to the Order.

THE COURT: Right. So the -- you're reading from the protocol, right?

MR. RAY: I am reading from the protocol. I would've understood that that protocol, it is part of the Order. So if ---

THE COURT: Yeah.

MR. RAY: --- the Order is in under her affidavit; it should be as well.

THE COURT: I think it's fair to ask this witness, was she aware of that part of the protocol, and whether or not that formed part of her communication strategy in turn -- and, you know, what did she understand it meant and in her role and did that form part of her communication strategy.

MR. RAY: My Lord.

BY MR. RAY:

Q. So in your role, what would you understand? And if you'd like, I will read the passage again.

THE COURT: So first of all, ---

MR. RAY: Yeah.

THE COURT: --- the question is, was she aware of that passage in the protocol?

THE WITNESS: I can't say that I was specifically aware of the protocol, but I was certainly aware of the intent behind the protocol.

BY MR. RAY:

Q. All right, madam. So what would the intent be there? So in -- as a communicate -- as a communications person for the government?

A. The request was for businesses and organizations to ensure that patrons were fully vaccinated before they availed themselves of events or activities on the premises of those location, would be my assumption.

Q. But is this -- is this statement formed as a request?

A. No.

Q. It is a demand, is it not?

A. It reads as a legal requirement.

Q. A legal requirement. So then we are being -- my organization is being informed here that under the law of Nova Scotia, such law that was enacted, as it says here, by the Chief Medical Officer of Health, that this is a law of Nova Scotia and that we must follow it?

A. I should amend, as a lay person and not a lawyer, that's certainly how I would interpret it. However, I'm not a legal expert, so I should not probably give an opinion as to whether it's a legal requirement or not.

Q. Right. But the protocol was not issued to the legal community alone, was it? It was issued to every person in Nova Scotia, including my organization.

A. Correct.

Q. Okay. So there is one other --

okay. Again, we're touching on the protocol embedded in the October 4th Order. If -- so same -- the same question will come at the end. In your view, as a communications person for the government, what is being communicated here? So I quote:

> If necessary, enforcement action could include fines of $2,422.50 per person, or $11,622.50 per corporation. [Which would be us.] It could include closure of the business or organization hosting the event or activity until they comply. (As read)

A. And you're asking for my understanding of what that means.

Q. What would -- so for my organization would that indeed mean that if we opposed the protocol we would not be able to function.

MR. BOYLE: Justice, I think Ms. Walsh has been clear she's not capable of offering a legal opinion, nor would that be appropriate. And that appears to be the intention of the question. It's further a hypothetical ---

THE COURT: Well, I think there's two issues. One is she can't tell you what your organization thought, Mr. Ray, and then we have this issue about a legal opinion is fair if she -- if this fell within her role as a Communications Officer. Or I'm not sure if she called herself a Communication Officer or was it a Director of Communications?

THE WITNESS: Managing Director.

THE COURT: Managing Director of Communications.

If in that role she acquired an understanding and what that was, that's fair.

MR. RAY: My Lord, I guess what I would say here is that she -- what I am asking her is as a communications person for the government, what does she believe that passage is communicating, generally?

THE COURT: That’s ---

MR. RAY: I guess maybe I phrased it wrong.

THE COURT: That's what I -- I think that's what I just said. That if she -- if this was -- if this part of the protocol that you're putting to her, if she came to an understanding in her role as a Managing Director of Communications and what was that understanding. I think we're saying the same thing.

BY MR. RAY:

Q. Could -- well, what would -- did you, in your role, come to an understanding of this; and, if so, what was your understanding of this part of the protocol?

A. Yes, I did. My understanding was that non-compliance with the vaccine protocol could result in fines for the business or the individual.

Q. And indeed, ---

A. Closure.

Q. --- possibly closure; complete and utter cessation of the activities? I would think that's what closure of the business or organization means.

A. Yes, that would be my assumption.

Q. All right. Thank you, ma'am.

Okay. Are social media platforms an authorized form of communication per the *Communication and Information Act* for you?

A. They are, yes.

Q. Thank you.

All right. The next question had to do with the date of the first iteration of the Order. And you have -- you have -- now, with your date of the use you -- are you aware that on March 6th, the Chief Medical Officer of Health issued orders concerning people arriving at Stansfield Airport?

THE COURT: What year are we talking about now, Mr. Ray?

MR. RAY: Oh, sorry. That would be 2020. So this would be March 6th.

We have, we have now moved the date of the first iteration from March 22nd, as previously stated

by the Crown, to March 15th, as stated by Ms. Walsh.

THE COURT: Yeah.

MR. RAY: I am concerned -- I am simply asking if she was aware that the CMOH had issued instructions or orders concerning people arriving at Stansfield Airport in that if they came from an overseas location, if they had a new fever they would have to do certain things that -- oh, go ahead, sir.

THE COURT: Go ahead.

MR. BOYLE: Sorry. Justice, my concern is that it's presenting an assertion as fact, without further clarification on the witness's awareness of earlier issues. Or it just seems there's a presumption that Ms. Walsh would accept what is being proposed as fact following the question, rather than establishing whether she agrees that such Order may have been issued.

THE COURT: I didn't take it that way, Mr. Boyle. I took the question to be was she aware that on March 16th, the CMOH issued particular directions or

Orders -- he called them instructions or Orders regarding people landing at Stanfield Airport? It wasn't anything more than that, I didn't ---

MR. BOYLE: Right, but there's a presumption underlying that that the -- that an Order had issued on said date.

THE COURT: No, it's not. There's -- he's asking if it did.

MR. BOYLE: Okay.

THE COURT: if she knows it did.

MR. BOYLE: That's fine, Justice, as long as it's understood in that context.

THE COURT: Yeah, that's all -- that's all he was asking, whether or not she's aware that happened -- or is she aware that that happened. If she's not aware -- I don't have any evidence that it did happen, but it's a fair question to ask if she knows it.

MR. BOYLE: Thank you, Justice.

THE COURT: Okay.

Mr. Ray?

MR. RAY: The reason for my ---

THE COURT: No, you don't have to explain it.

MR. RAY: Okay.

THE COURT: It's a fair question. Go ahead, Mr. Ray.

Ms. Walsh, the question is whether or not you're aware that on March 6th, 2022 the Chief Medical -- the CMOH issued instructions or orders about people landing with particular symptoms ---

MR. RAY: It was a YouTube video with the Chief Medical Officer of Health giving instructions that ---

THE COURT: Well, I don’t care what the video. We’re just asking if she's aware of this happening.

MR. RAY: Yes, okay.

THE COURT: But what we're asking is

on March 6th, giving the CMOH issuing instructions or Orders about people exhibiting particular symptoms landing in Stanfield Airport. Is that the question?

MR. RAY: Yes, My Lord.

THE COURT: Okay.

Ms. Walsh, are you aware of that?

THE WITNESS: I'm aware that the CMOH did a media availability on March 6th, 2020 to offer advice to Nova Scotians on how to stay healthy, given what was being seen in other jurisdictions and around the world. I believe there may have been some federal advice for travellers returning to Canada, to monitor their symptoms and potentially isolate themselves from friends or family if they were feeling unwell.

I would challenge that the CMOH issued an Order in the formal way that the Public Health Orders were issued. My interpretation would be he was giving advice to Nova Scotians.

BY MR. RAY:

Q. Thank you, ma'am.

MR. RAY: That would conclude our questions, My Lord.

THE COURT: Okay. Thank you very much, Mr. Ray.

MR. BOYLE: Thank you, ma'am.

THE COURT: Any re-direct?

MR. BOYLE: No re-direct, Justice. Thank you.

THE COURT: Okay, thanks.

Thank you very much for your evidence, Ms. Walsh. We need to mark that as an exhibit.

MR. BOYLE: Yes.

THE COURT: I don't think we marked it as an exhibit yet. So we should mark your affidavit. Yeah, leave it there, that's fine. Thanks very much.

MR. RAY: My Lord, could I -- one more question or did I...?

THE COURT: Ms. Walsh, it's a little

unusual but ---

MR. BOYLE: I suppose, Justice, we just closed, there's ---

THE COURT: I don't think there's any prejudice.

MR. BOYLE: --- limited prejudice.

MR. RAY: It was simply to ask Ms. Walsh about this document.

THE COURT: Okay.

MR. BOYLE: And Justice simply reserving the right to re-direct if necessary.

THE COURT: A hundred percent.

Go ahead.

MR. RAY: May I give her the document or...?

THE COURT: Show it to Mr. Walsh first. Not Mr. Walsh, Mr. Boyle; sorry.

MR. RAY: Okay. And do I just go up and give it to her?

THE COURT: Yeah. Now, just to be clear though, Mr. Ray, you're not allowed to ask questions on it if she doesn't know what it is or she can't authenticate it.

MR. RAY: I do understand, My Lord.

MR. BOYLE: And Justice, just to head off another issue perhaps to confirm that that would be marked as an exhibit as well at this point?

THE COURT: It'll be marked maybe for identification purposes, if she's able to authenticate it.

MR. BOYLE: Certainly. Thank you, Justice.

THE COURT: If not, it's a nothing.

BY MR. RAY:

Q. So ma'am, simply a question is, do you have any knowledge of that Guide to the *Health Protection Act* being issued?

A. I'm familiar there is a guide. It certainly looks like a guide that would've been issued

from the Department of Health and Wellness, but I don't have familiarity with it, no.

Q. To your knowledge, is that the only guide, or do you know of another or updated guide that would've been issued?

MR. BOYLE: Justice, I think that was answered with the first response.

THE COURT: She says she's not familiar, she's aware of a guide, this looks like the guide, but she's not familiar with the contents of the guide, is what she said. So I -- but I don't think that answers the second question. She may be aware of a -- she's aware of a guide; she may be aware of an updated guide.

THE WITNESS: I'm not aware of an updated guide.

BY MR. RAY:

Q. Thank you, ma'am.

MR. RAY: And that would be all, My

Lord. My apologies.

THE COURT: Well, now the question is whether or not she authenticated it sufficiently to add it, because you wanted it marked as an exhibit.

MR. RAY: Yes, My Lord.

THE COURT: So the question is whether or not she's authenticated it sufficiently to do that. Because all she says is she's aware of a guide, it looks like a guide.

MR. RAY: Yes, My Lord, I understand.

THE COURT: But she's not familiar with this contents and she's not aware of any update.

What do you say, Mr. Boyle?

MR. BOYLE: I echo Your Lordship's comments a moment ago to say it hasn't been properly authenticated. She's aware there is a guide.

THE COURT: I didn’t say it hasn’t. I said -- I said she has to ---

MR. BOYLE: Certainly, but ---

THE COURT: --- we have to have ---

MR. BOYLE: --- my submission, Justice, would be it hasn't been authenticated for those reasons, but there may be a guide, and this looks like a guide is not sufficient to say this is the guide.

THE COURT: Well, she said she's aware of the guide, it looks like the guide.

I think that's what you said, didn't you?

I don't think she said, “A guide”; she said, “The guide,” I thought.

But maybe you’d like (inaudible due to mumbling) Ms. Walsh?

THE WITNESS: It certainly looks like an authentic document from Health and Wellness.

RE-DIRECT EXAMINATION BY MR. BOYLE

Q. I suppose my question would be, can you confirm this is a guide that was issued in the fall of 2005? Do you have direct knowledge on that point?

A. I do not.

MR. BOYLE: And, Justice, that would be my concern.

THE COURT: Okay.

Anything further from you, Mr. Ray?

MR. RAY: Not for the witness, My Lord, no.

THE COURT: Okay.

It's a fairly low threshold for admissibility. I'm satisfied that there's sufficient -- with this witness's evidence that there's sufficient information before the Court to indicate that that was a -- that that was the guide issued in 2005. The rest of it, though, will go to weight because she said that she's not aware of an updated guide, that doesn't mean there

isn't one, so there could be a weight issue yet.

MR. RAY: My Lord.

THE COURT: So we'll mark -- thank you again, Ms. Walsh, appreciate it.

(WITNESS WITHDRAWS)

THE COURT: So we'll mark the -- Ms. Walsh's affidavit as Exhibit 1 In this hearing; we'll mark the guide as Exhibit 2.

EXHIBIT NO. 1 - AFFIDAVIT OF MS. TARA WALSH - MARKED AND ENTERED

EXHIBIT NO. 2 - GUIDE - MARKED AND ENTERED

THE COURT: Anything else in terms of the evidence that we need to discuss before we move on to submissions?

MR. BOYLE: Not from my perspective, Justice.

THE COURT: Mr. Ray, anything from your perspective?

MR. RAY: No, My Lord.

THE COURT: All right. So just to be clear, the evidence that's before the Court is the affidavit of -- and we should probably, given that we marked the other thing. Well, I guess, it was subject to cross-examination. So the affidavit of Ms. Hipson is before the Court, but subject to a paragraph 8 being struck and all the exhibits that we talked about before. The affidavit of Ms. Walsh, who just testified is before the Court; that's Exhibit 1. The affidavit of the guide from 2005 is Exhibit 2; that's before the Court. And that's the only evidence before the Court. The evidence of Dr. Milburn is not before the Court.

Okay. Anything further before we go into submissions? No? Okay.

Mr. Boyle, do you want to -- now, you were talking about breaks. Do you want to take a break, Mr. Boyle, or...?

MR. BOYLE: I'd appreciate a brief break. Either early lunch or just a brief break for now

would be fine by me, but I would like a few minutes, if possible.

THE COURT: Okay. I'd like to go -- I'd like to continue until 12:30 to get as much done as we can. How long do you expect to be in submission, Mr. Boyle?

MR. BOYLE: I don't anticipate being more than 10 minutes or so, Justice. I expect I'll be fairly brief on submission, subject to any questions, but I don't think I'll be taking a great deal of time.

THE COURT: And am I right that the real concern, from your perspective, is twofold. One, now that the -- what we'll call them the vaccine mandates have been lifted, there's no live issue, and that the absent a live issue and this issue of whether or not there's any utility and the Court's residual discretion to make declaratory relief demands that there be some utility to the declaratory relief. And it's very narrow when that -- circumstances when the Court will exercise that

discretion?

MR. BOYLE: Yes, Justice. At a high level that is -- I've attempted to be transparent in the written submissions, and I don't believe I've got much more to add to those, subject to any questions you may have had arising.

THE COURT: But that's the primary argument?

MR. BOYLE: That's the primary argument, yes, Justice.

THE COURT: Okay. I wanted to say that just so, Mr. Ray, so you can focus yours. So what we're going to be talking about is this concept of live issue, which you've already mentioned, so I know you're familiar with it. And as well the related concept of declaratory relief having some utility. In other words, what's -- what are we to gain from a declaration? The Court just doesn't make declarations because, you know, it feels like it. There has to be some utility to the

declaration that's being made.

MR. RAY: Yes, My Lord.

THE COURT: As that term is understood in the case law.

Okay. Let's break, then, until, we'll say five to 12:00, and then we will hear from you, Mr. Boyle.

THE CLERK: All rise, please.

Court is in recess.

--- Upon recessing at 11:38 a.m.

--- Upon resuming at 12:03 p.m.

THE CLERK: All rise, please.

Court is resumed.

THE COURT: Thanks, everyone. Please be seated.

Mr. Boyle.

MR. BOYLE: Thank you, Justice.

SUBMISSIONS BY MR. BOYLE

MR. BOYLE: As I promised before the break, Justice, I will look to keep the oral submissions on behalf of the Respondents' brief. The Respondents continue to rely upon the brief and the reply brief that were filed in this matter, which set out the position in-chief. What I propose to do is review the **Borowski** test, as Your Lordship canvassed it prior to the break, with a view to offering an opportunity for questions should Your Lordship have them, and to comment upon some of the information that came out of evidence this morning.

THE COURT: Your promise was 10 minutes.

MR. BOYLE: I promise ---

THE COURT: I won't hold you to it.

MR. BOYLE: --- I will keep it as close as I can, Justice

Mootness obviously is the sole issue being determined today. We've had public interest

standing, I commented in written submissions that the Applicants focus a great deal on issues that may come up at the merit stage of this proceeding, but we're very discrete and narrow today focused on the issue of mootness.

Borowski is the leading case on mootness that continues to be cited across Canadian jurisdictions in considering mootness. The additional cases that have been submitted in the main brief of the Respondents; and in particular, **van Naum** (Sp?), **Spencer C.M**, **Bowen**, and **Taylor** are examples that illustrate application of the **Borowski** test to circumstances surrounding challenges to COVID restrictions and similar issues.

Those cases are illustrative, and I would submit, very helpful to this Court in considering the present mootness Motion. But, ultimately, the discretion of this Court exists to consider a matter that's determined to be moot and has to be considered on a

-- the context of the material before the Court.

The **Borowski** test involves two stages. The first is to establish whether or not the matter is, in fact, moot. And in **Borowski**, the Supreme Court of Canada defined that as the absence of a live controversy.

In **Borowski**, the Court was considering the challenges to *Criminal Code* provisions dealing with abortion legislation, but those provisions had been struck down before the Supreme Court came to the determination of **Borowski's** issues. And ultimately the Court did determine that because the matter had been determined, it was moot.

The matter here today involves a request by the Applicants for a series of three declarations relating to the *vires* of the Public Health Order and the alleged bad faith in issuance of that Public Health Order.

The Public Health Order, per the evidence of Tara Walsh, has not been in effect in any way since May 2023. That does not appear to be contested.

The evidence of Tara Walsh, also not contested on cross-examination, is that the application of the Public Health Order against members of the public, outside of high-risk settings, elapsed in July of 2022.

There is no Public Health Order in place; there are no ongoing restrictions. The determination, therefore, it's respectfully submitted, of the *vires* of the legislation are the Public Health Order, or circumstances of its issuance, have become moot; there is no live issue between the parties.

Mr. Ray this morning did comment upon the desire of Citizens Alliance to seek damages personally against Dr. Strang. As I indicated this morning, Justice, that position is new to this mootness Motion, and the Respondents have indicated throughout the proceeding to date that other options than judicial review were available to receive remedies, should they be sought.

I would point out, Justice, in anticipation of comments Mr. Ray might make, that section

12 of the *Health Protection Act* considers liability of the Chief Medical Officer of Health. That does provide insulation, except in cases of bad faith, but it doesn't require that bad faith be established through a judicial review process. There's no reason, I would submit, that can't be established in evidence; and, in fact, would be better established through an evidence-based proceeding.

Your Lordship commented on the public interest standing decision in this matter, that the different mechanisms of proceeding come with benefits and detriments. There are advantages or disadvantages to any process. Here the intention appears to be to establish one aspect of what could otherwise advance as a civil claim.

There is no evidence, I will repeat from this morning, that any claim has been filed; that there had been an intention from a point in time to seek damages; or that there is an inability of Citizens Alliance to seek such remedy did they -- would they choose

to do so through an alternate mechanism. So the matter, from the Respondents' perspective, is moot; there is no live issue at this time.

If it's accepted by this Honourable Court that the matter is moot, that the question then becomes, ought the Court exercise discretion to proceed, notwithstanding mootness? As I mentioned, that is a discretionary call to the Court, assessing the facts and the evidence.

Borowski sets out three guiding factors that the Court must consider when determining whether to proceed.

The first is the existence of an adversarial context. There is no ongoing impact on either Applicant established in any form of evidence in this proceeding, which would establish an ongoing adversarial context. Per the evidence of Tara Walsh at paragraphs 10 and 11 of her affidavit, we can see that. And as I mentioned, that was not challenged this morning in cross-

examination.

It appears that the adversarial context, as framed by the Applicants, is focused on what has been phrased "Vaccine mandates," which are no longer in effect. The lack of their existence eliminates an adversarial context. The fact that a proceeding in judicial review is ongoing does not mean there is an ongoing adversarial context or the matter could never, by definition, be considered moot.

The second factor in considering whether to ---

THE COURT: How does the adversarial context work in the circumstances where if it actually is moot?

MR. BOYLE: I'm sorry, Justice?

THE COURT: So if the matter is actually moot, under what circumstances -- under that argument, under what circumstances could an adversarial

context ever exist? If it's over, it's over.

MR. BOYLE: I'm sorry, Justice?

THE COURT: Isn't the adversarial context something different than that?

MR. BOYLE: I take your point, Justice. I think I phrased that poorly. A better way to say would be are there likely to be collateral consequences, perhaps; is there an ongoing relationship?

I'd refer Your Lordship, by way of example, to the **Daniels** decision in the Book of Authorities from the Supreme Court of Canada, where the ongoing relationship between government and Métis people was unaddressed and could -- would benefit from clarification because the nature of the ongoing relationship exists.

That would be a case where an adversarial context exists. Here the Public Health Order affected the Applicants in their individual ways at points in time, but that has not been true since 2022 and the

Order hasn't been in effect at all since May of 2023.

THE COURT: So what do you say to the argument that -- let's say I accept your -- I accept everything you're saying, but let's say the Citizens Alliance of Nova Scotia stands up and says, "Well, there is an adversarial context because what if this happens again? And this is our concern as an organization, this is our -- this is why we came together as an organization, and we're looking to essentially prevent a reoccurrence, and we have an adversarial relationship with the government that wants to preserve the power to do that again."

Does that -- does that satisfy that factor, or does that go beyond what that factor is looking to?

MR. BOYLE: It certainly goes beyond that factor, Justice. I submit that may be more applicable to the third aspect of the exercise of discretion, the adjudicative function.

THE COURT: Yeah.

MR. BOYLE: And this has been considered in those cases considering COVID restrictions that I've cited for Your Lordship.

I refer you in particular, though, to the **van Naum** (Sp?) case at paragraph 50 and the **Taylor** case at paragraphs 39, 30, and 31. All of these -- the comments contained in these cases say that, "Look, the restrictions existed at a point in time due to a pandemic and the evolving understanding and circumstances of that pandemic." The same may never occur in future. Should another pandemic occur, the fact pattern must be established on its merits at that time.

This is not a case, as I commented on the brief Justice, like the Liberal Party case, where we have elections every four years and they follow a root form, and clarification of the decision-maker's discretion was appropriate because it could repeat.

These are unique circumstances that

are treated under discretion of the decision-maker, Chief Medical Officer of Health under the statutory authority, with the flexibility to react to circumstances; those cannot be predicted.

And Your Lordship commented to some extent on that in the public interest standing decision with respect to predicting the unpredictable, the -- these are not Your Lordship's words, but effectively the -- the intention would be not to fetter the hands of government to react to an unknown in future, but to treat a concrete fact pattern at the time it occurs, and the reaction thereto at that time.

Any guidance this Court could offer under this first consideration, adversarial context, would be a comment on the past; was something reasonable at a point in time?

Mr. Ray was saying this morning that the focus of CANS will be on the October 4th, 2021 Order. That's not what is indicated in the most recent Notice for

Judicial Review. There's a much more extensive number of Orders for which it appears there is a review sought. But each must be considered on its face. So if this Court were to proceed and consider each individual iteration of the Order, the question would become on October 4th, was a certain restriction reasonable with the information that was available? Perhaps by the next iteration were it determined to be unreasonable, it would be reasonable at that time, given the fact circumstances

The nature of communicable illness, particularly novel communicable illness like COVID-19, is that it continues to be studied and information continues to come to light over time, and decision-makers in the Public Health context will adapt accordingly. Any determination this Court were to make at a point in time would be of little to no precedential value, I would submit, to a future occurrence.

THE COURT: But isn't -- would -- and so would the result of that argument be that where you

have circumstances of this case, because things are evolving and because things are unpredictable, that there's no accountability because maybe it's unreasonable today, but it might be reasonable tomorrow or maybe it's unreasonable today, but it's unreasonable tomorrow that there's no -- there's no method to put the concerns forward, bring the concerns forward?

MR. BOYLE: There could be, Justice, but that, again, coming away from the adversarial context comes to some extent to judicial economy.

THE COURT: Okay.

MR. BOYLE: One of my submissions there that might link back to ---

THE COURT: Well, judicial economy or the final factor, which is, you know, the Court understanding its role in this dispute.

MR. BOYLE: Yes, right. And the government has to have the flexibility to adapt to circumstances, and the Court ought to consider those

circumstances. But I understand Your Lordship's question to be about, effectively, evasiveness of review.

THE COURT: Well, sort of that **Pratt**-type, *habeas corpus*-type issue that where you have something that where the government's acting and things happen so quickly and something goes wrong, but because it happened so quickly and now it's over, you never have a chance to look back and see what you could have done better or what you did wrong in the first place because it's over now; it's moot. And, you know, that's the sort of -- and that was a *habeas corpus*-type context. But that's a similar type argument that was made where something becomes evasive of review because people are saying, well, it's either over or you know, it, you know, it won't happen again or was so unique and it's so different, and...

MR. BOYLE: Right, Now to distinguish a little bit, the *habeas corpus* cases were evasive of review, as suggested in **Cochrane** (Sp?) and some of the

cases cited by Mr. Ray, because there are typically of short duration.

THE COURT: Yeah.

MR. BOYLE: And oftentimes an incarcerated person is released from whatever deprivation of residual liberty existed before the matter can come to the court.

THE COURT: Right.

MR. BOYLE: And that recurs in the context of correctional facilities routinely. Public health issues are not routine. They don't follow a predictable formula. So evasive of review, the question becomes one of utility, which is a factor that a number of courts, including those in the cases I've cited dealing with COVID, have weighed; have said there's little utility to saying at a point in time this was good or not, because there's no benefit to that.

If it could become important later to Your Lordship's point, and I understand your concern; does

that not mean that these would always be evasive of review? I would submit no. And the facts of this case demonstrate that. This judicial review was filed in October of 2021. It did not become moot as it applied to the Applicants until July of 2022.

THE COURT: M'hm.

MR. BOYLE: Now, I appreciate Mr. Ray, in the written submissions for CANS has said, "Well, 10 months is hardly enough time to get through a judicial review," but, respectfully, it -- judicial reviews do happen on that kind of scale routinely.

In that intervening time, from October '21 to July of '22, there had been the Motion to add the minor Applicant, J.M. These are procedural points. There were issues with the form of the original filing, which CANS' counsel, in December of 2021, requested time to go back and reformat.

So this is not evasive of review. There was that period of time where the matter could have

moved ahead. It was just down to procedural and technical issues that it wasn't heard in that period of time.

THE COURT: So if it -- if it had have been heard in that time, hypothetically if everything had gone correctly, if it hadn't have been heard, there was nothing about it that could preclude it from being heard.

In other words, your arguments around, "Well, it might have been reasonable then, but we have to look at it, was it reasonable at another point in time? And then was it unreasonable again?" Do those -- would those same that arguments have been in play during those same 10 months?

MR. BOYLE: It would depend on the particular restriction. Some restrictions persisted; some were removed over time. At all times the *vires* of the Order could have been considered, ---

THE COURT: Right.

MR. BOYLE: --- at large. The -- and that's an important point as well, Justice, because as

I've said, as it pertains to the individual Applicants in their own private understanding capacity, the Order was no longer of any practical effect as of July of 2022. But the Order wasn't fully lifted until May of 2023, so the Order and the *vires* of the Order could have been argued in a broad scale throughout that time.

Now, I appreciate I hadn't moved this Motion before the Court at that point in time, but the fact that, to your point, Justice, would it not be beneficial for some commentary from the Court on what's happening? That might have been beneficial when there was a Public Health Order, but there hasn't been since May of '23. And moreover, as I say, these cases considering COVID restrictions ---

THE COURT: Why would it have been beneficial then, but not beneficial now? Just because it was ongoing and the Court ---

MR. BOYLE: Because there was an Order. If there was ---

THE COURT: But at the point that the Court, if it had worked -- if it had given a declaration at the time, would've been beneficial because it could have affected something that was ongoing?

MR. BOYLE: Right.

THE COURT: Whereas now it's not affecting anything that's ongoing?

MR. BOYLE: Right, yes. There were rights and some individuals affected. The mechanism remained the same. That's none of this -- we can't predict what will happen in future. So that's what I'd say about the adversarial context.

THE COURT: Okay.

MR. BOYLE: So I'll move on, then, to the judicial economy consideration, which I would submit these are not factors that need be equally weighed, that some may be weighed more heavily than others, but this, to the Respondents, is the most critical consideration.

Substantial resources have been

applied, both by the Court and by the Respondents, to get this matter to this date.

As you'll recall, Justice, I believe Your Lordship's first sitting with respect to this matter was in August of 2022, a Motion for Directions shortly after the initial mootness Motion had been filed.

At that point in time, the mootness Motion, which was filed and ready to go at that point in time, was not set down to permit the Applicants an opportunity to receive the record. We received directions to provide that by October of '22, and it was delivered.

The next step anticipated in August of '22 was that Citizens Alliance would review the record and bring a Motion to supplement it if they felt a need to do so.

But that didn't happen. Additional Motions were brought instead to further amend, to add a further Applicant. The Motion to deal with a further Applicant was deferred and later abandoned before Your

Lordship rendered a decision.

Even down to today, Justice, there are issues with procedure and filings. The first hour or so Court was taken up with whether we had issued affidavits available.

These issues have been persistent and required further time and effort and resources on the part of both the Court and the Respondents to advance, and are not insubstantial.

The complexity of the proceeding leaves much to be desired as well, where, as I pointed out earlier in these submissions, I appreciate Mr. Ray saying the focus is on the October 4th, 2021 Order, but that is not what is cited in the pleading; that there are more orders that are pleaded as being sought for review.

This is something the Respondents have consistently sought to narrow, let's focus, and it hasn't been forthcoming to date. So we have a pleading that differs from submissions, and those issues will have to be

resolved, and will have to be resolved as well in the context of any record Motion, if and when that is brought; again, having been anticipated by late 2022,

THE COURT: What if the argument -- and I know you're just dealing with this sort of on the fly a little bit, Mr. Boyle, but if the argument is, well it really is just down to this protocol in October involving what they would describe as a vaccine mandate? What if it really just comes down to that protocol? Does that affect your argument at all, in terms of judicial economy?

MR. BOYLE: I think, Justice -- again, I have concerns about standing around that. And one of the unresolved issues that would have to be resolved is, is that the issue? Can we get there? Because, again, the pleadings have been amended three times at least.

THE COURT: Yeah.

MR. BOYLE: I think four times by this stage, with the removal of one of the requested reliefs.

If that is what we're doing, this would be a fifth amendment a year -- almost a year and a half, two years beyond the lifting of the Order. At what point do we draw the line and say, "This matter had an opportunity to go ahead, but the continued application of resources, particularly with **Jordan** considerations and others affecting the Court, does this matter warrant dismissal? What benefit will it give?

I would also comment on those, again, five cases considering COVID-19 restrictions that I've given to Your Lordship.

There are citations and considerations by the courts in those cases about how this matter wasn't evasive of review; that these matters have been considered across the country. And that was before these ones that dealt with mootness itself. So the courts have determined, not in this jurisdiction but elsewhere, that this matter is -- these types of concerns need not proceed.

THE COURT: You're talking about the **Taylor** and the -- the **Taylor** case and the ---

MR. BOYLE: Particularly **Taylor**, yes, Justice.

THE COURT: Okay.

MR. BOYLE: But also the other four **van Naum** (Sp?), **Spencer**, **C.M**, and **Bowen**. But yes, **Taylor** is the principal one on that point.

THE COURT: And was the -- in the -- in those cases, if you were going to sort of summarize them, was the Court's principle concern judicial economy or was it adversarial context, or was it the issue of the Court's appreciation of its judicial function?

MR. BOYLE: I think it was a balanced, Justice, with an emphasis on judicial economy and respect for adjudicative function.

THE COURT: Okay.

MR. BOYLE: Because in addition to the judicial economy concerns, in particular, **van Naum** (Sp?),

at paragraph 47, there were comments by the Court on the extent of material provided to date. And I'm summarizing and paraphrasing here, Justice, please appreciate that. The Court appeared to be saying that, "Look, there's a sunk cost. There's an argument by the Applicants that 'Look at all the effort we've made so far, this has to continue.'"

THE COURT: M'hm.

MR. BOYLE: But the Court looked at it and said, Yes, but look at how far we have to go yet, and what's the utility in proceeding? There's no benefit, so let's cut this off."

The adversarial context has also been markedly pronounced in those cases. With the lack of a crystal ball available to future pandemics, will they occur? What will they involve? What will be reasonable at that point in time? Unlike elections, unlike *habeas corpus*, when the issues are fairly standardized, we don't know what any future pandemic, if any, would involve, what

might be reasonable at a point in time.

So the respect for the adjudicative function has echoed in these cases, fairly resoundingly, to say, let's ensure that decision-makers have the flexibility to do what they need to do, given circumstances at a point in time, which are unknown at this time. That can be reviewed because that will be a concrete fact pattern that can be assessed. That is what is lacking now, given that the health orders have been lifted.

Now, to say to the issue of, "Well, all that's being requested here is declaratory relief," I would refer to the **Kassian** decision from the B.C. Court of Appeal on that, which I've cited and distinguished. But they did make a comment about -- like paragraph 31:

> Confirming that merely seeking a declaration is not sufficient to insulate a matter from being moot. (As read)

I also want to distinguish some of the cases that Mr. Ray has cited in CANS' submissions,

particularly from the Alberta Court of King's Bench, certain cases that proceeded in their contexts, despite mootness, seeking declaratory relief, specifically. Those were all pre-**Daniels**. So **Daniels**, Supreme Court of Canada, made the comments that are cited in the Respondent's brief about not applying declarative relief to moot issues. So distinguish them in that way.

So, again, I've covered this off already, Justice, of mixed up the judicial economy and adjudicative function, to some extent. But to summarize the adjudicative function main points, there isn't a Public Health Order in place now. The circumstances of COVID-19 were novel and unique. Future pandemics cannot be predicted, and the responses cannot be known until they occur. And a decision-maker has made a decision about how to approach them. If future pandemic and restrictions do occur in any form, they can be brought to the court at that point in time.

And I'll note, Justice, I commented in

my submissions, but just to emphasize, this judicial review was filed in October of '21, but as we heard in evidence this morning, Public Health Order in some form related to COVID had been in effect since March of 2020 at that time. So that just goes to the fact that this particular instance was unique and was not -- a challenge could have been brought when the restrictions occurred and wasn't.

So for those reasons, Justice, I will summarize by saying the evidence coming out of this morning from Ms. Walsh establishes that there isn't a Public Health Order in place. Flowing from that, there is no live controversy, there is no evidence to the contrary. There are submissions that CANS has made about what they might do, but as I've said, there are other options that have been, and remain, available to them should they choose, which might better suit their stated intent, which was not, again, pleaded or raised at a point in the past.

And so subject to any further

questions, Justice, I know I'm a little over 10 minutes, but ---

THE COURT: No, that's fine. I appreciate it, I was just joking.

But I do have one question. What do you say to the argument that when you step back and you look at sort of what seems to be motivating a lot of these problems that you had, in your words, a very unique circumstance in the pandemic, but what do you say the argument that the uniqueness of the pandemic is what triggered a very unique and -- a uniquely and acutely serious response?

In other words, you have a unique circumstance set demanded a very unique and acutely serious response, in terms of what people had to do suddenly to respond to the pandemic and what they were being asked to do or what they were being told to do. In other words, it was very important to people. What do you say to the argument that where something is so disruptive

in people's lives, rightly or wrongly, and where it's so important and it touches upon people's kind of fundamental views of freedom, how can you say that it's not really something the Court should concern itself with? How do you deal with that kind of fundamental argument where -- which what underlines it all is that sort of reaction to responses that many people thought were very -- a serious restriction on them?

MR. BOYLE: Thank you, Justice.

I'm just trying to find a reference. I could be wrong; it may have been in **Bannonon** (Sp?) but one of these courts that I cited considered that very issue.

THE COURT: Yeah, right.

MR. BOYLE: And they defined it as, I say small p.i., public interest. There is public interest. There are obviously members of the public here today to hear argument. That is not sufficient per the decision. And again, I believe it was in **Bannonon**

(Sp?) ---

THE COURT: It may not be determinative, but is it a factor? Is the fact that this was a very significant event in the lives of Nova Scotians and the lives of people all over the world, is that something that the Court ignores and we just focus on, "Well, is this going to take too much of the Court's time," or we focus on, "Well, is there an adversarial context? Well, no, because the matter's done." So that that kind of public concern around the importance of what just happened is lost in the equation.

MR. BOYLE: Again, Justice, I've made this argument to you before ---

THE COURT: Oh, I know.

MR. BOYLE: --- about how that would appear more like a form of public inquiry that would be less suited. I don't think a judicial review, particularly with individuals with private interest standing, trying to focus on discrete issues, would give

the satisfaction, assuming the Applicants were successful, that Your Lordship would be suggesting. I think any individual affected by the Order could have brought a judicial review.

And, again, I've been consistent in these submissions since December of 2021; individuals affected can bring a claim. And one of the main concerns I had at that point, that I continue to have today, given the presentation of pleadings on its fourth amendment, is these are not issues that the private interests can address.

So where are the voices for any aggrieved individuals? Ought there be a public interest component to it, if that were the -- what the Court was weighing? I don't think that through this process, the factor Your Lordship proposes is necessarily appropriate, and it certainly hasn't been defined in the cases.

THE COURT: So is the answer to that question, then, that if there are those sort of broad

public implications, it's not for an individual to bring those forward; it's for somebody on behalf of the public at large to bring those forward or...?

MR. BOYLE: I ---

THE COURT: Because, I mean, part of the, part of the concern kind of intuitively is where you have individuals that say, and their organization kind of sprung to light because of this vaccine mandate, where you have them -- where that's sort of their reason for being and where you accept the initial proposition that what was happening was obviously a very important, some people would say beneficial, other people's would say it was just, you know, an unnecessary restriction. But it's obviously important. And I don't hear you saying that what happened wasn't important and that it wasn't disruptive.

So is the answer to the question of why, where does that fit in, are you saying that doesn't fit into the equation or -- at all or ---

MR. BOYLE: I think so, Justice. If at all, it would fit under utility, but I think that would be a very soft utility of the declaratory remedies that are being sought.

THE COURT: Okay.

MR. BOYLE: Because it's not defined, and again, there is no evidence, it's a sense, and at best it would be a judicial notice on Your Lordship's part ---

THE COURT: Right.

MR. BOYLE: --- that factors into the analysis. But Your Lordship is constrained by **Borowski**, ---

THE COURT: Yeah.

MR. BOYLE: --- so it must fit into the framework ---

THE COURT: Right.

THE COURT:

MR. BOYLE: --- somehow.

THE COURT: Right.

MR. BOYLE: My submission would be it ought not factor significantly, if at all, for what it's worth.

THE COURT: And so then what do you say when you're trying to communicate why it wouldn't fit into the **Borowski** and why the important issues would not come forward this way? What would you say to that? What would your answer be to that?

MR. BOYLE: I'm sorry?

THE COURT: If you're saying that the kind of thing I'm describing shouldn't properly fit into the **Borowski** test, which is to what we're talking about, the mootness test, and the -- when the Court will exercise some residual discretion? If we agree that it was important, but you say that it doesn't really properly; it's like a sort of a round peg in a square hole where it doesn't properly fit into that analysis. What do you say to the person that would then ask, "Okay, so how do -- how do these issues get resolved if they're important? What

happens where we have an issue?" What would the answer be to that question? Do you just say, "Well, there is, it's not **Borowski**, but I don't know," or how would you communicate ---

MR. BOYLE: Right.

THE COURT: --- that dilemma?

MR. BOYLE: I think it's communicated under the adjudicative function portion, Justice. There's -- we live in a democratic society.

THE COURT: Right.

MR. BOYLE: If these matters are important and crucial to members of the public,

THE COURT: Right.

MR. BOYLE: --- they have elected representatives in the forms of MLAs. They can reach out; there can be communication with those representatives to see if there are solutions that might come up through the legislative branch. But the judicial branch, respectfully, might be stepping into the shoes of the

legislative branch to some extent were it to proceed on that kind of public messaging basis.

The Court's role, as compared to the legislative and executive branches, is to serve as an impartial arbiter.

THE COURT: Right.

MR. BOYLE: Again, in broad strokes.

THE COURT: Okay.

MR. BOYLE: But I think the assumption that all Nova Scotians were against Public Health restrictions is not true. It is similarly not true that all were for them.

THE COURT: Right.

MR. BOYLE: That's what democracy exists to work out.

THE COURT: So for the purpose of this proceeding, you would say that the Court has to stay in its lane. The Court has to understand what its role is when these very significant disputes arise and make sure

that it's not -- I guess your argument would be make sure that it's not doing something where suddenly -- I was not elected, I'm not -- I'm a judge, I was appointed, I wasn't elected, but suddenly I'm making decisions of public policy that are probably more better -- better reserved for the adjudicative branch or the legislative branch?

MR. BOYLE: Yes, Justice. And, importantly, public policy at a point in time in the past no longer exists, which may have some kind of binding effect, potentially, on future decision-makers where the powers are intended to be flexible to adapt to unknown circumstances.

THE COURT: Right. Although, I mean, you could appreciate the frustration of someone where there's a function call -- or an institution called the court that's supposed to resolve disputes where you bring your grievances forward for a resolution, and yet there are these sort of very significant disputes or problems that you're being told, "Well, that's not my job. You

better go vote at the next election, or you better go speak to your legislative assembly member."

MR. BOYLE: I think any ---

THE COURT: That may be just the reality of the messiness of democracy, as you say, but you could see how that would create a certain level of, "What do I do?" This is very...

MR. BOYLE: Certainly, Justice, and I think that would be true of any respondent to a mootness Motion, that there's one party that says we must proceed anyway, but the Court is to make an independent determination on that front. I think -- I appreciate the sentiment, Justice, and I recognize it exists, but mootness exists for a reason, and the test has been set by the Supreme Court of Canada.

THE COURT: No, I know, but we have to be able to articulate mootness in a way that makes sense to the public, so it's not just some sort of technical apparatus that nobody -- is so foreign to everybody, and

they're left wondering, "Well, exactly, where do I turn?"

So all I'm saying is it has to be communicated in a way where the law makes sense and it's not just sort of technical rules that we apply but that don't seem to make sense.

MR. BOYLE: Well, I think -- and, again, it's falling into the technical rules, to some extent, Justice, but the Court can only address the matters that are before it, and there are two Applicant parties with private interest standing, ---

THE COURT: Right.

MR. BOYLE: --- which is narrow in scope.

THE COURT: Right.

MR. BOYLE: So how can the Court use that to answer a broader societal public policy question? I don't think those two concepts are compatible.

THE COURT: I take your point. It's -- but it -- but a lot of it is sort of making sure that

you understand because if you walked out into the public today and said, "What do you think of mootness?" I think most people would say, "I have no idea what you're talking about." You know, it's a legal term, so it's important that we be able to communicate exactly what is being intended and what the limits and the guardrails are on these kind of legal concepts.

MR. BOYLE: Certainly, Justice, and I appreciate I'm -- Ms. Walsh this morning is a communications person, I'm a legal person. And I think those roles, ---

THE COURT: Right.

MR. BOYLE: I appreciate that what I'm saying might come across as legal, but in terms of communication, I certainly take your point.

THE COURT: Oh, I'm not saying there's any fault with you, Mr. Boyle, at all. I mean, I very much appreciate your submissions, and we're here to talk about the law, that's what we do. So I'm not saying I'm

not -- again, I'm not being critical at all. It's just that part of what -- part of the Court's role is to apply the law, that's a big part of the Court's role, but it's also to communicate the law in a way that creates integrity around the process and integrity around the adjudicative function.

MR. BOYLE: And I think the courts -- again, I'll refer to those five cases again, just generally, it was evident to me in reading those that these kinds of considerations were that the courts communicated through their decision and there are the ---

THE COURT: No, and I read the decision, and I appreciate that.

MR. BOYLE: Other than perhaps **Spencer** at six paragraphs there were -- the communication was inherent there.

THE COURT: Yeah.

MR. BOYLE: "Here's what was said, here's how we weigh it, and here's how -- what we're going

to do with it."

THE COURT: And here's why.

MR. BOYLE: Yeah.

THE COURT: Yeah. I know that, and people often say that the most important word in judicial decisions is the word, "Because" guess that's when you're explaining what you're doing.

Okay. Thanks very much, Mr. Boyle. Appreciate it.

MR. BOYLE: Thank you, Justice.

THE COURT: Mr. Ray, I think -- how long do you think you'll be, Mr. Ray?

MR. RAY: I'm sorry, My Lord?

THE COURT: How long do you think you'll be?

MR. RAY: This presentation could be about 15, 20 minutes.

THE COURT: All right. I think what I'll do is I would like to take a break for lunch. I'm --

we're sort of -- we usually break at 12:30, so I'm kind of running in overtime and I'm kind of becoming a little too notorious for ignoring people's lunch breaks and the end of day. So I would like to take a break for lunch, ---

MR. RAY: Absolutely.

THE COURT: --- if that's okay with you?

What if we came back at 2 o'clock for your argument? Is that okay?

MR. RAY: That's fine. That's suits us perfectly, My Lord.

THE COURT: Okay. And then we'll have any re-direct from you at that point, Mr. -- or rebuttal from you.

Actually, before we do that, though, will you be saying anything, Ms. Olivier?

MS. OLIVIER: Thank you, My Lord.

Yes, we do have some oral submissions to add.

THE COURT: Okay. How long do you think you'll be in the submission?

MS. OLIVIER: Ten (10), 15 minutes at most.

THE COURT: Okay. Well, I'm going to change, then. Why don't we come back in an hour? How about if we come back at quarter to 2:00? Is that okay? Is that enough time for everybody?

MR. RAY: Yes, My Lord.

THE COURT: Yeah? All right, we'll come back at quarter to 2:00 for the Respondent -- responding party's submissions. Okay?

Thanks, everybody.

THE CLERK: All rise, please.

Court is now recessed.

--- Upon recessing at 12:46 p.m.

--- Upon resuming at 1:53 p.m.

THE CLERK: All rise, please.

Court is now reconvened.

THE COURT: Thank you, everyone. Please be seated.

Okay, Mr. Ray?

MR. RAY: My Lord.

SUBMISSIONS BY MR. RAY

MR. RAY: Okay. All right. I will just address a few points that Mr. Boyle brought up this morning orally, and then finish off by addressing myself to his written rebuttal.

Mr. Boyle mentioned several times the cases of **Taylor** and **Naum** (Sp?). We would note -- the Applicant humbly notes that those cases are not single cases. Those are amalgamations of several cases that involved a wide variety of claims against a wide variety of restrictions. And in only one small part of the **Naum** (Sp?) case was any allegation of *ultra vires* action made. And that allegation depended on a very close reading of what the word "Reasonable" meant in the *Quarantine Act*.

Mr. Boyle has repeatedly stated that we should have done some other thing; that we should have made application or action, and then, indeed, other people did not do these things from the March 2020 kickoff of the pandemic throughout the noted period.

So we would note a couple of things there. First off, the cause by the Respondent, there were heavy, heavy restrictions on the courts at that time. The Respondent might object to this, but in the original filing of this Motion, the Sheriffs would not originally allow me in the building to file it.

At that time, around that time in October 2021, there were several judicial notices that had been taken by the courts of Nova Scotia; again, caused by information given them by the Respondent, which *grosso modo* commented favorably that vaccination was both effective and safe and the best way for the courts to handle themselves. So in the face of all of that, we say the assertion that any person could have done any particular thing during that period is not completely correct.

Addendum to that is it's the plain fact that for a citizen to file in their own name any cause of action, any judicial review against the

government carries with it incredible risk to the citizen. The costs that could be awarded by the Court, on top of the *grosso modo*, $100,000 it would cost you in legal fees to go against the Crown.

CANS suffered collateral economic damage, we say caused by the Respondent, that continues to the day and is the reason that you poor gentlemen have to put up with Farmer Bill over here as counsel, otherwise, we would be represented by someone far more competent than me.

The counsel for the Respondent at one point suggested that this matter would be more properly taken up with our elected officials. Elected officials have no power to adjudicate unlawful behaviour, nor do they have the power to punish it. In the sort of the midst of the pandemic in, in my memory just a couple of months before the October 4th Order in which we are concerned was issued, there was a change of government. It was hardly noticeable because the actual government of

this province at the time consisted of the Respondent sitting in front of TV cameras every day and giving out Orders. That was our government for a period of about two years.

So that is my response to what Mr. Boyle has verbally said.

In response to his rebuttal, at paras 13, 14, the Applicant has pointed out in our written submissions, and we continue to say this, that in fact Monkeypox has been declared a pandemic by the exact same authorities the Respondent relied on solely in the instant case, as we say that the epidemiology that was handed over with the record doesn't actually support the existence of a pandemic in Nova Scotia.

So he was reacting to things that he says were happening in the world, or these other authorities said were happening in the world. We would note here that neither the WHO nor Public Health Canada has a legal responsibility and authority for the health of

Nova Scotians.

The recommended treatment for the now-declared by the WHO pandemic of Monkeypox -- which at least sounds a lot funner than COVID, I'll admit that, maybe they'll get some little costumes, maybe a little car. The recommended treatment for this by the WHO and Public Health Canada is vaccination, as it is for almost every infectious disease. We say this is an uncontroversial fact.

We also say it's an uncontroversial fact that epidemics of infectious diseases have occurred, and will continue to recur, repeatedly. And that given the position of the CMOH, or any antecedent holding that position, they will be the ones that respond to any outbreak of infectious disease. And we say that doing so, solely within the law, is important and that they must do that.

The Applicant -- or, sorry. The Applicant says that the adjudication would cause the

administrator and his antecedents to act within the law, which should at all times restrain them.

Counsel for the Respondent speaks of some hypothetical future event that might be somewhat different, and that they have to react to that specifically. It matters not the material facts of any future event; they should at all times be constrained to act within the law.

Para 18, the Respondent -- counsel for the Respondent says that a breach of law is moot if it happened in the past, *grosso modo*. He's saying, "Well, even if the law was breached here, it's not being breached now.

We say this is incorrect, partly because of the **Attorney General of Nova Scotia v. Freedom Nova Scotia**, the case argued by the CCLA. One of the points we argued -- they argued, which we would say is the same in our instance, is that without adjudication, the issuing by the judge of the injunction against pretty much

everything that was the centre of the Freedom Nova Scotia or **Attorney General v. Freedom Nova Scotia** case, so without adjudication that, basically, law had been created; that the Attorney General had been given additional powers that he did not have before, and no court had checked this, no legislature had passed it. And that, we say, is exactly the situation here because in the words of documents issued by -- and the Respondent here was the Chief Medical Officer of Health in 2005 when the *Nova Scotia Health Protection Act* was enacted, that individual, the impugned administrator, had, under his authority issued a -- the October 4th Order and embedded protocol which says directly, "Proof of vaccination requirement is the law in Nova Scotia."

If this be so, then -- so we say that without adjudication that will continue to be the law as a matter of just fact. If this is allowed to stand and any -- the CMOH or any antecedent in that position, of course would feel that they can act in the same manner that guide

the protocol of one of these Orders says they're creating laws (inaudible due to mumbling).

And, again, so the position of the Respondent is that this is all over and what are we all wasting our time here for? If that be so then why does the Crown continue to prosecute offences that were only offences created by the Orders, if they are no longer in effect? No-one who is being prosecuted has successfully pleaded mootness, so the punishment for violating the Orders seems to still be a matter of ongoing concern, even if the Orders are not.

And in this, and I plead a little indulgence here. I know that to speak of the criminal law is not an exact mirror of our matter here as we are in a civil term and we are talking about administrative law. But there are prohibitory sections of the *Health Protection Act* that prohibit the administrator from doing certain things or enjoin him. Section 2 enjoins him to disturb the constitutional rights of Nova Scotians as

little as possible; section 53.2(a) enjoins him, or limits him to only a voluntary vaccine program. So there is a limiting or a prescribed nature to it.

So in that sense, what the Crown is saying here is that even if there was unlawful action that had serious result, it doesn't matter because it's all over. So in the world of the average citizen, and I will use the criminal law again, understanding no *parens parenti* [*sic*], it's not a perfect mirror.

But if I were to say -- and I would not do any of these things of course, but if I were to, say, wander up the street of this good town and enter one of your lovely banks and make a withdrawal using, say, a firearm instead of my bank card, which again, I would not do, at some point I would finish this activity. I would indeed finish getting the money and I would walk out the door. One hopes at some point near after that the local constabulary would collect me and they would bring me before you, My Lord. And if I then said to you, "Well, My

Lord, I'm not robbing the bank now, so why are we all here?" I'm pretty sure I would not walk out the court without the escort of one of your sturdy sheriffs.

So we say the same should apply here; unlawful action is unlawful action, whether committed by the citizen, but most especially when committed by the state against the citizen. And we say that is in fact, we hope, one of the purpose of this place and the people in it, is to give us a level playing field when we are the victim of unlawful government action. And that matter should not be considered moot.

We are not arguing about -- you know, we are not making constructions of the Constitution and delving its depths. We are saying that *prima facie*, this man acted in an unlawful manner and that that should be adjudicated so that it does not happen again.

I mean, one assumes one of the reasons that I -- if I were to go down and make said withdrawal from the bank, that I would then be spending some time at

the pleasure of the state is so that I don't do it again. I believe that's part of the reason. So we say the same reasoning should apply.

At para 19, the entire function of the -- what we call the unlawful mandate that was levied on us -- because indeed we were mandated to carry out these functions. Public Health didn't send somebody to check ID at the door; we were mandated to do it. We were mandated to violate the rights of our fellow citizens. We refused to do that.

And the whole purpose of the thing was to levy massive financial penalty. And in our case, I would say, entirely prevent us from functioning. Literally under the October 4th Order embedded protocol we couldn't hold a board meeting in person.

At para 2122, we do in fact have consistently pleaded that our *Charter* rights were violated, and we asked the declaratory relief for such pleaded breach. So we have indeed pleaded that our

Charter rights were violated.

We also say that directly -- and the Crown makes note of the fact that we have not mentioned things like tort of unlawful means, tort of administrative misdeeds. And we haven't mentioned that before. We were going for public standing. Had we achieved public standing we'd be talk -- we would be standing here talking specifically about vaccines, but we didn't. So I am here, all I can speak for is the corporate person. And so the damages to the corporate person are of a tortious nature.

The fact that we have not yet filed said claim -- we come here to the court with the assertion that what was done was unlawful. We have every right to come before a court on judicial review and have an action of an administrator reviewed to see whether it was or was not lawful. And if it is unlawful, found by the Court, not by Farmer Bill over here, then of course we should, and are able to, use that judgment to do other things. There's nothing improper in that.

And in fact, the Crown says that we have not yet filed such action. We would say that that would be insulting to the judicial economy. Why would we have two matters in front of the same court in general at the same time arguing the same things? Yes, we would have more rights in the Application, but again, in 2021 to make Application or an Action, the evidence that would've been required to, say, apply for an injunction against the mandate or to take a direct action to sue the government for what it was doing, the evidence for that was not available to anyone; anyone. The only holder of the information would have been the Respondent. The only way to compel automatically the Respondent to hand that information to us is judicial review. Otherwise, it has to be done through discovery motions.

At para 19 the Applicant -- what we are stating is that the actions of the administrator formed many of the component parts of a tort of unlawful means. We just need to determine was it indeed unlawful,

and this is why we are here in front of this Honourable Court.

And, again, the purpose behind the protocol and the October 4th Order was to levy huge financial fines against us if we in any way failed to comply. And by "Comply" I don't mean just that we went and got vaccinated; by complying we would have to violate the rights of people trying to attend one of our events, from our point of view. And the Order to do so, from our point of view, was unlawful from the start.

When I was in the military, it was very much pointed out to me that I should never follow an unlawful order of any kind because that's when the bad stuff happens.

THE COURT: I'll just pause you there.

MR. RAY: Yeah.

THE COURT: I just wanted to just confirm, Mr. Ray, I just was handed now, it was -- apparently came in over lunch. It's a signed copy of Dr.

Milburn's affidavit.

MR. RAY: Oh Lord.

THE COURT: It was just received, but it's not properly signed. It's -- Dr. Milburn signed the first page in front of a guy named Harold Roberts, but Harold Roberts didn't sign any of the exhibits. They're all blank

MR. RAY: As far as we were -- are concerned, that matter has been dealt with, My Lord, and we are satisfied.

THE COURT: But I just wanted to let you know that.

MR. RAY: My Lord, thanks.

THE COURT: I'm sorry Mr. Ray.

Could I ask you, Mr. Ray -- could I ---

MR. RAY: Yes.

THE COURT: --- please jump in for a couple questions?

MR. RAY: Absolutely.

THE COURT: Is your claim narrowed to the October 4 Order and the embedded protocol?

MR. RAY: Yes, My Lord.

THE COURT: That's all?

MR. RAY: Yes, My Lord.

THE COURT: All right. So anything else in your claim about all of the other protocols and all of the other Orders is now not being pursued; you're focused on that one issue?

MR. RAY: No, My Lord. The -- we are focused on that solely. The original Application in this matter was written by me.

THE COURT: Right.

MR. RAY: And that's what the original Application addressed.

THE COURT: Okay.

MR. RAY: We engaged counsel, and counsel did various things ---

THE COURT: Yeah.

MR. RAY: --- that were not of our desire.

THE COURT: Yeah.

MR. RAY: We obviously we cannot speak to that here, but no, we are concerned with the October 4th iteration of the Order and the embedded protocol. We will not be speaking or bringing evidence to any other matter.

THE COURT: So when you say, "The Action was unlawful," you mean the Action of creating the October 4th Order with its embedded protocol?

MR. RAY: Yes, My Lord.

THE COURT: That's what you mean. Okay.

And we've been talking about mootness and **Borowski** and all this sort of thing. We only get into mootness and **Borowski** if it's, in fact, moot. Do you agree that the Order that you're worried about, the October 4 and the embedded protocol, was lifted as of, at

the latest, I think you said July of 2020?

MR. RAY: July 6th, 2022. Yes, we ---

THE COURT: Twenty twenty-two (2022).

MR. RAY: --- would agree to that.

THE COURT: So do you agree that we're into **Borowski**? In other words, that the Order that you complain about being forced upon your organization, it was lifted. So at that point we're into **Borowski**. Do you agree with that proposition?

MR. RAY: Absolutely, My Lord.

THE COURT: All right. So if we're into **Borowski** then we're into the three elements of **Borowski**; the idea of judicial economy, the idea of the courts staying within the adjudicative function that they're designed to do. And -- I'm going to forget the third element now. I think I wrote it down. Oh yeah, right, the adversarial context, the live issue. So that's what we're into, that test?

MR. RAY: Yes, My Lord.

THE COURT: Okay. All right, good. Okay.

And you say it's unlawful now, and you want a declaration, you want a person of authority; in this case, the Court, to say -- to call an unlawful act of unlawful act. Essentially, you would say call it like it is, and if it was unlawful, call it unlawful.,

Your argument about it being unlawful, I understand from what you're saying it's based on, number one, that they didn't have the statutory authority to do what they did in -- on October 4 with the embedded protocol; correct?

MR. RAY: My Lord.

THE COURT: And you're -- are you also saying that by issuing the October 4 Order and the embedded protocol, that it was contrary to your *Charter* rights? Is that part of the argument as well for a declaratory relief?

MR. RAY: Yes, My Lord, it impacted

our *Charter* rights.

THE COURT: Okay. And so there's those two issues. One, you went beyond the authority that you actually had, and in doing so you also breached the *Charter*.

MR. RAY: Yes, My Lord.

THE COURT: Okay. So -- and I'll come back, I'll circle around to that. But this issue of you need a declaration, so you want a declaration that was unlawful, but you also want a declaration that the CMOH was not acting in good faith, right?

MR. RAY: Yes, My Lord.

THE COURT: All right. What utility do you get out of that declaration, other than the potential to then pursue that individual for personal liability under the Act?

In other words, what benefit -- what do you get from it? I understand your point about, "Well, as a citizen who's made subject to the laws of the land, I

-- if the laws were not lawfully imposed upon me, then I should be able to have someone say that." So I understand the point -- you know, sort of the theory behind your point. But I'm -- what's a little more elusive to me is why do you need the ability -- is there something else other than, "I need the declaration that he was acting in bad faith so that I can after him"? Is there anything else beyond that? Is there any other kind of reason ---

MR. RAY: Well, we say ---

THE COURT: --- for that declaration?

MR. RAY: --- under the **Borowski** test, as I have argued, that the bad faith actions form part of a tortious behaviour toward us because they were in bad faith. We say that the bad faith action is inseverable from the *ultra vires* action in that the bad faith action was taken to set the stage for his *ultra vires* action and then to, if not enforce, to amplify it; to give it life.

THE COURT: But you can do things that are -- that are outside your authority without acting in

bad faith. You know, I mean, you can just -- you can -- somebody -- the Legislature could have done something, and it would be not in bad faith, but they did actually act outside their statutory authority. For example, going additionally -- going that additional distance to say, "That person was also not only acting outside their statutory authority, but they're acting in bad faith too." Because not every statutory breach and not every *Charter* breach is in bad faith. So I'm wondering what it is -- what -- the word that they use in the cases is "Utility," and utility meaning some form of benefit, some sort of advantage, some s -- something more coming out it -- coming out of it that will -- that the Court could say there's a legitimate reason for what's being requested.

But as I understand it -- and there may be more to it, but as I understand it the reason you need bad faith, the reason you need something more than just, "You're acting *ultra vires*, you're acting outside your statutory authority, you're acting..." -- you need to

go further and say, "I also need a declaration they're acting in bad faith." Is there anything more to that? What else other than the ability to then pursue other people down the line do you get from that, or is that really the reasoning?

MR. RAY: Well, we say that as part of meeting the test of **Borowski**, ---

THE COURT: Yeah.

MR. RAY: --- an adjudication has to have a practical effect on the party. So it would, we say humbly, have the practical effect of allowing us to, instead of suing our neighbours, sue the person who did the wrong. We say that the social, the societal utility of this, My Lord, ---

THE COURT: Yeah.

MR. RAY: --- you know, I have -- you know, after 50 years in the country, I have seen, repeatedly, governments do various things and get called out on it. When they get called out on it, someone is

wrong, they sue the government. And nothing ever changes because in the reality of things, I'm an administrator, I do something that causes a suit, I don't care, not my problem; talk to the Crown.

And when I was in the military, I'm driving -- I mean, a good example, I'm driving my truck down the road. You're there in your Honda Civic and I run over you. Well, as long as I'm not drunk or something, it's not my problem; it's the Crown's problem.

So we say the societal, or the utility beyond our own private utility in this matter, is that if the individual themselves suffer -- is caused loss because of their unlawful action, then the next human being that occupies that position is definitely going to think twice.

THE COURT: So is it fair to characterize it as the reason you need a declaration in bad faith is because if you get it, you can then make an example of these individuals, and I guess to place it -- put it more generously, create enhanced accountability?

MR. RAY: Yes, My Lord. Yes, and also we feel -- and again, one of our main thrusts of being here, the reason I'm dressed up and playing lawyer ---

THE COURT: You're doing a good job.

MR. RAY: --- is because we want to ensure that this never happens again. That these people act only within the law.

THE COURT: Okay.

MR. RAY: And that -- yeah. And so we feel that that would improve that, yes, My Lord.

THE COURT: So on that, because we have to be very careful about -- I have to be careful that I stay within the confines of my authority, just the way you said that -- you say the government should have stayed within the confines of their authority during the pandemic. So we all have to be careful of our roles here.

But in terms of your role on behalf of the Citizens Alliance of Nova Scotia, anybody would want to -- anybody in the public would want to make sure that

their government officials are acting within the confines and the boundaries of their legislative authority. That that is not unique to CANS. What do you say is CANS particular interest? Because when I hear you say things like, "Well, we have to make sure governments act within their statutory authority," that is a -- that sounds like very much a very -- a public issue. That's something that the public would want to ensure.

But when it comes to Citizens Alliance of Nova Scotia, how do you connect your organization's particular interest? Because you're now -- you're not acting in the public interest; you're acting in your own corporate interest. How do you connect that corporate interest to the relief you're seeking?

MR. RAY: Our corporate mandate and Charter, ---

THE COURT: Right. Okay.

MR. RAY: --- direct us to do exactly this.

THE COURT: Okay. And what does it say that you -- what does it say that you -- that you say, "This is why I'm here, because this is our reason for existence"?

MR. RAY: This is our reason to -- this is why people give us money. This-- we, as corporate officers, are bound ---

THE COURT: Right.

MR. RAY: --- to pursue the corporate mandate and vision. We are bound to do that as elected Board members. So that is what we are doing. That is why CANS is here and not, I don't know, the -- some other organization whose mandate purposes it to do something else.

THE COURT: Okay.

MR. RAY: This is our mandate. This is exactly our mandate.

THE COURT: And in a sentence, how would you describe that mandate, on behalf of the Citizens

Alliance of Nova Scotia?

MR. RAY: To ensure at all times that governments act within the law and that citizens' rights are not trampled by them.

THE COURT: Okay. And are you -- and is it your position that if this is deemed to be moot and you're not entitled to the declaratory relief, that your organization has somehow lost its reason for being?

MR. RAY: No. What I say is we will be back ---

THE COURT: Okay.

MR. RAY: --- with some other Application, some other Action, something.

THE COURT: Right.

MR. RAY: We will keep hammering this until the wall breaks or our heads break.

THE COURT: Okay. Okay. No, I understand. I'm just thinking it through in my own head ---

MR. RAY: Oh sure.

THE COURT: --- because it becomes a very fuzzy line. If you have an organization that says, for example, "Well, my mandate is to act in the public interest," then what's the point of having public interest litigation if you can just stand up and say, "Well, that's my mandate anyway. So I don't need public interest litigation. I don't need a public -- I don't need to act -- to say I'm acting for the public interest because that's actually what I'm created to do as an organization"?

And I'm just trying to, in my own mind, understand how we -- how we divide those two roles.

MR. RAY: We would say it this way, My Lord, as Lord -- I believe Lord Atkin did in Electricity Commissioners v. somebody or other in my -- it's in my pleadings, that the righting of a private wrong can have public good. So we would look at it that way, that yes, we are here in our private interest, but we are still

pursuing our mandate through exercising our private interest.

THE COURT: So that's what I'm -- that's what I wanted to get at. Explain to me and -- what the impact was on your organization. So not generally what this did to people's rights and what this did to the public at large, but to Citizens Alliance of Nova Scotia. What happened to them and what's happening to them that that makes this an acutely important issue for them?

MR. RAY: Well, what happened to us is at the time when it was the most possible to raise money to conduct these sort of things, we were prohibited from doing that effectively.

THE COURT: Prohibited from your advocacy?

MR. RAY: Well, we were prohibited from gathering, we were prohibited from having fundraising events because obviously we were not compliant. There were organizations similar to us in other parts of the

country that were not restricted in the same way that raised a lot of money. And so, again, as I say, one of the collateral effects is the fact that you two learned gentlemen have to put up with me today.

THE COURT: Okay. Is there anything else that was specific to this October 4 Order with the embedded protocol that uniquely hurt your organization or impeded its growth or ability to do what it's supposed to do?

MR. RAY: Well, absolutely. It is -- it is difficult, especially -- and I'm going to put us back in the context of October 2020.

THE COURT: M'hm.

MR. RAY: There were headlines in newspapers that said, "Jail the Unvaccinated"; there were serious people being quoted in the press saying, "Deny him healthcare," do this, do that. As I have already noted, you could barely enter a court, and when you did, you knew for a fact that the judge had already taken judicial

notice of this, that, and the other thing, which would've had a massive chilling effect on us or anyone else coming in at that time.

I -- we do take note that in his initial brief for mootness, the counsel for the Respondent mentioned those judicial notices that had been taken. We notice they are absent from the current version.

THE COURT: Okay. Is there anything else that -- because I just want to make sure I fully understand the argument ---

MR. RAY: Well, it also ---

THE COURT: --- for your organization.

MR. RAY: --- it gave us sort of third -- sort of third-party liability, in a way, because we are now mandated -- as I said, it wasn't a Public Health Officer that was going to come to our event and start demanding identification and vaccine and medical information from people. It's us, right? So we have liability toward those people. Any one of those people

had, we refused them entry to our event, could have sued us. So he created -- unlawfully created a liability for us toward a third party.

THE COURT: Okay. And that's because if you had been seen as encouraging or promoting or gathering as unvaccinated people, you would've attracted -- the organization would've attracted liability; is that the point? Or you would've pushed it on to someone else?

MR. RAY: No, had we -- had we decided to carry out the unlawful mandate scheme, ---

THE COURT: Right.

MR. RAY: --- we -- one of us and our organization would've been the person coming up and demanding somebody's ID, demanding ---

THE COURT: Oh, I see.

MR. RAY: --- their medical status.

THE COURT: Understand.

MR. RAY: That is -- that could be a tortious action toward us from that third party.

THE COURT: So essentially forcing the -- forcing you to not only contravene your own mandate, but ---

MR. RAY: The Constitution or various laws, yes, we believed yes.

THE COURT: Okay.

MR. RAY: Or we say. Sorry, My Lord.

THE COURT: Yeah. Okay. Thank you.

Unless there's anything else? Is there anything else that you wanted to mention on that point?

MR. RAY: No. ,Well I have -- I have a bit depending on ---

THE COURT: No, no, no, no. I'm not cutting off here.

MR. RAY: But on that particular subject, I have nothing.

THE COURT: Just on that question?

MR. RAY: I have nothing, no.

THE COURT: Okay.

MR. RAY: Okay. On para 27, the Respondent lists a number of our cases and colours them as immigration cases, which are -- I'm going to get the word -- distinguishable from the current case. We say that the -- and I believe I'm using the right term here, the jus redica [*sic*], the judicial reasoning for these is analogous to our case.

These cases involved mootness hearings for judicial reviews on various immigration matters, but the reasoning in the mootness cases themselves, we say is applicable here.

In those cases in general, what the judges said in keeping them, in keeping them live or in finding that there was a live conflict, is that the impugned administrative action would reasonably impact future applications that these people made. So in that particular case, that's very dependent, right? Because the person has to make the accusation or has to make

another application, and that's *sua sponte* of them, whether they do or not.

So there isn't a certainty that the adjudication would have an effect. Given that these people are not citizens of this country, it would have no force and effect the country of their residence; whatever was found by a Canadian immigration judge would not affect them in their everyday lives.

And, again, it was all very -- or it was reliant on that person making another application. Just as in our case, we say that this could possibly happen in the future, and it is reliant not on us doing anything, but on the CMOH doing a thing because he can decide tomorrow, based on Monkeypox, that we're right back at it because all of the precursors of what he did exist for Monkeypox right now.

The WHO has declared it; Public Health Canada has declared it; Public Health Canada has struck committees to study response. So ---

THE COURT: But what do you say ---

MR. RAY: --- the idea that this is some unique event? No, there have been repeated pandemics, especially respiratory diseases, in this country. The actual scientific name for COVID is SARS-CoV-II because SARS-CoV-I arrived in Canada in 2003 during the invasion of Iraq.

THE COURT: What do you say to the argument that the Monkeypox issue cuts both ways and that it may -- the fact that it has been declared a pandemic and there's no vaccines yet in Canada or Nova Scotia, to my knowledge, or required vaccines, that it's proof that the danger and the mischief that you're worried about is really sort of confined to a very unique circumstance that's now over? And that the danger that the government will now continuously and presume the right to overstep it back its bounds is live when it's -- when it's not repeating itself in the Monkeypox situation?

MR. RAY: Well, we ---

THE COURT: I'm not saying that's a legitimate argument. What do you say to that argument?

MR. RAY: I don't think we can say that yet. The COVID pandemic began in March 2020. The Orders for what we call a coercive vaccine mandate wasn't given until October. They like to ease you into it maybe, but it certainly doesn't stop -- all what I'm saying is the Respondent ---

THE COURT: But you said -- so would you know when Monkeypox was declared a pandemic? You said earlier it was declared a pandemic.

MR. RAY: I don't know if I have the exact date, but it is currently,

THE COURT: It's -- the World Health Organization has declared it a pandemic.

MR. RAY: Yes, My Lord.

THE COURT: Okay. In any event, it's -- I'm just curious to know your response to the potential ultimate argument.

MR. RAY: Ah, sorry. It was *ratio decendi* [*sic*] that I was looking for. Not -- there we go.

We say the *ratio decendi* [*sic*] of these cases is analogous to our matter and not discerning.

The cases -- oh yeah. So the cases, we humbly say are analogous, in that reviewable error by the impugned administrator potentially affecting the rights of the party was deemed to be a live conflict. And certainly the CMOH has a potential to affect our rights ---

THE COURT: Are you reading ---

MR. RAY: --- any time he wishes.

THE COURT: Are you reading from a case there now, Mr. ---

MR. RAY: No. No.

THE COURT: Okay.

MR. RAY: No, I just quoted the part of **Borowski** that is ---

THE COURT: Oh.

MR. RAY: --- a live conflict is the result of a -- the result of a live controversy:

> ...the adjudication of a live controversy that affects or potentially affects the rights of the parties. (As read)

THE COURT: Right, right.

MR. RAY: This is because -- and they made that decision because an unreasonable or misapplication of the administrator's home statute would potentially affect the party's rights in the future under that same statute.

We say that is the same here, although we say he doesn't have the statutory power to do it, but he has the precedent.

The Applicant asserts that the same connection exists in this matter as the administrator or an antecedent would obviously act in the same manner in future without adjudication, and predictably breach the corporate Applicant's rights.

The Applicant humbly notes that in

Kassam, the case of **Kassam v. Canada Minister of Immigration** stated, I quote:

> First, although the Court's determination will not affect the controversy which gave rise to this Application, it will have some practical effect on the rights of the parties because the Applicant will be affected in future applications for a visitor's visa. (As read)

In our case, we may affected -- we may be affected in carrying out our functions and mandate in the future.

Forgive me if I mispronounce this, **Grapendaal v. Canada Minister of Immigration**:

> The analysis part of the judgment to the present matter is at para 18, we say. As the Applicant points out, if the case is dismissed for mootness without a determination of the merits, the likely result will be that the applicant will reapply for another visitor's visa. If at that time the application is rejected, they may again choose to seek judicial review, adding yet another step in the Applicant's process and would result in the expenditure of additional judicial resources. Thus, it is more economical to decide this case on the merits at the present time. (As read)

We say that is analogous. I mean, the

Crown has presented many times that, "Well, you know, it's over and if it happens again, we can all come back to court." Why should we? We would make the exact same accusation in the next judicial review, that if he did the same thing he did here, that he was again beyond the law and we would start this process all over again. We feel that it's not helpful to judicial economy.

So at para 28 -- now, I have quoted the frontline nurses, the Federal Court case to do with the *Emergency Act* declaration.

The Crown has said that this is a different matter than our matter here because by their nature, the emergency declaration is an emergency, so it's of short duration and that that is different than what we have here because the Order was in existence for a long period of time.

But the part of the Order, the October 4th iteration that we here are discussing or we here are -- we wish to bring before you, My Lord, was only enacted for

10 months. And I suppose -- and you gentlemen certainly would know better than me, I suppose it is possible to stick in an application for judicial review and be out the door in 10 months. But that would require basically no motions being made, no differences between the opposing attorneys over facts or any other thing.

We say that it's a stretch to say that absolutely a judicial review could have occurred in those 10 months. We feel that's a stretch. And, again, we note that at the beginning of that, the October till quite some time, the courts were highly restricted. I could not have appeared in person in your court to make these arguments, My Lord; I would have been barred, and that is a fact.

THE COURT: You would've been barred in person. Would you have been barred remotely at that time too? I can't remember when the ---

MR. RAY: That I don't know, but I would've been barred in person, and I have the right in person to come before the court.

THE COURT: And is that right ---

MR. RAY: Unless I'm a prisoner.

THE COURT: But is that right contravened if you're given an alternative to appear virtually?

MR. RAY: Well, I mean, I can't speak to how well that worked, but I do know that the courts were backed way up. I know that there were a couple of pedophiles that got to use the **Jordan** exception. I know that.

THE COURT: M'hm.

MR. RAY: It took a year for the Crown to deliver the record in this case. That don't fit within 10 months. And in our -- in the instant matter before you, we have made the point repeatedly that, okay, so he says there was an emergency declared under the *Emergency Management Act*, which I believe they had to redo every 14 days. So that's really pretty short duration. You're stacking them, but that's a pretty short duration per

Order.

And we say, obviously, in our pleadings, that the -- that what he did was only allowed after the declaration of a public health emergency.

There is nothing in section 32 of the *Health Protection Act* that allows the CMOH to institute any sort of vaccine or immunization program. Only the Minister of Health may do so. That is not what happened.

The power for the CMOH to institute any sort of immunization program is contained in section 53, whose preamble clearly states that on the advice of the CMOH, the Minister of Health will declare a public health emergency, and then the CMOH may do A, B, C, D, E, F, G, H, I, J, I believe.

So in either case, whether Public Health emergency or *Emergency Act* emergency, they're still emergencies, and they are still, in -- the word "Emergency" basically means short duration.

At paragraph 30, counsel for the

Respondent impugns our use of the **Health Freedom Defense Fund v. Carvaljo** case in the United States.

So we say that the analogy here, and we understand that there is no exception to mootness in the Nova Scotia law, but the point here is that when you are dealing with one individual or one small group that *sua sponte* can take and rescind actions, that it is somewhat problematic to have a mootness doctrine that applies strictly, because obviously at any time that administrator can remove whatever's being reviewed and go, "Well, it's over, so..." And that would allow them, in short periods of time -- and, again, by short I mean six, eight months -- to just stop and start these things.

In the **Carvaljo** case itself, in the United States, that was exactly the point. The Freedom Defense Fund was going against the administrator of a group of schools in Los Angeles, and they kept basically putting in a vaccine mandate for the students and other restrictions. And then as soon as the case would get near

court, they would simply withdraw it. They did this three or four times, and the judge in this case then said no.

THE COURT: Is there any evidence here that that's what this government did? In other words, that they lifted it just to avoid your organization and to avoid this lawsuit and to avoid exposure? Evidence I'm talking about.

MR. RAY: I cannot speak that I have any direct evidence of that. What I can say is that as soon as our matter went in, way back in October '21, we heard a lot less from Mr. Strang. And the restrictions, in our view, seemed to at least stop piling on.

THE COURT: But it wasn't similar to the **Carvaljo** case where sort of ---

MR. RAY: No, I have no direct evidence ---

THE COURT: --- the idea that ---

MR. RAY: --- that Mr. Strang saw our ---

THE COURT: --- or that, "They're on to me ---

MR. RAY: --- pleading and ---

THE COURT: --- so I'd better stop it, and I'll start it up again somewhere else"?

MR. RAY: Yes. What I'm saying is that it's certainly possible.

THE COURT: Okay.

MR. RAY: We know -- and, again, slightly going back to an earlier point in that the protocol for the Order declared that whatever the CMOH ordered was the law of Nova Scotia, his Orders were also, and we say wrongly, put in *The Gazette* ---

THE COURT: *The Royal Gazette*.

MR. RAY: --- as if they were statute or law. So really what happened during that period is that an administrator became the Legislature and the courts. And we say this is not practicable, this is not -- this is dangerous to our society. And we say this

because, as you noted, I am constrained at all times by the criminal law.

I may not commit unlawful acts toward the state or toward any person because if I do so, I -- Canada isn't a big believer in the limit -- time limits on criminal acts and civil act. So for long periods of time, I am still liable for whatever it is I did, right?

If it be the fact that the government can commit unlawful acts whenever it pleases, and as long as it's not doing it by the time I get to court, it's all good? It makes us wonder; if that be the case, My Lord, then what is the purpose of this place and the people in it?

Is this the place where I come to be on a leavened field with the power and majesty of the state, or is this some sort of performative opiate to keep me quiet at home and make me think I have some rights?

My Lord.

THE COURT: Thank you, Mr. Ray.

Ms. Olivier?

MS. OLIVIER: Thank you, My Lord.

SUBMISSIONS BY MS. OLIVIER

MS. OLIVIER: We have some very brief submissions, oral submissions, and we continue to rely on our brief submitted.

So looking at the test online in **Borowski**, we first need to determine if a live controversy does exist. The orders under the *Emergency Management Act* and the amended protocol with the vaccine mandate directly impacted the minor, and it created the breach of his *Charter* rights.

In **Nassichuk versus the University of Lethbridge**, it was found that where *Charter* rights were breached, the matter remained a live controversy. Similarly, in **Pridgen versus University of Calgary**, it was found that action for declarative relief was not moot despite probation being passed under reference to discipline being removed.

The orders in question were inherently temporary. And in the interest of social justice, these

types of temporary orders need to be able to be addressed, even when there are no longer in effect.

Looking at the presence of adversarial context specifically where no -- if no live controversy were found, the Court has the discretion to hear the matter. Looking at the presence of adversarial context, the adversarial system was designed to preserve rights.

There is some uniqueness to these circumstances, and they continue to resonate with lasting impact. The question remains, if live controversy exists with the future risk of similar legislation to be enacted in similar, unique circumstances.

There is some concern for judicial economy, but we have to weigh the expenditure against the weight of the social cost of not having or losing faith in the judicial system and not -- for it not acting in the protective role towards vulnerable parties. This is an important issue, and it's especially important and worthy of review.

The Court's role is not to make legislative decisions, but to review the law, resolving outstanding disputes and to protect the vulnerable. The Court's in the position to provide guidance on the appropriateness of actions taken to guide the future similar circumstances.

Courts use their discretion where it is found to be an appropriate use of judicial resources. I submit that hearing this matter is an appropriate use of such resources. The minor was affected in this manner, and his constitutional rights were affected. I'm looking at **ALGC versus Spence-Edwards**, which provided that special consideration should be applied when constitutional challenges are involved.

There are social costs to leaving this matter undecided. In **Tremblay versus Daigle**, the Court decided to proceed with the case and to hear it to protect future pregnant mothers from the threat of the injunctive proceedings by their husbands or boyfriends in the future,

where the Court specifically looked into the future to see under similar circumstances to protect people in similar situations.

We're asking the Court to proceed to decide the matter to protect the future minors from the future threat of similar legislation in the future.

It is needed to be resolved that this is important legal issue, and we need some answers to guide us in the future, but similar things popping up. It's -- the law is constantly developing and some of the legislation might very likely be enacted.

In **Doucet-Boudreau versus Nova Scotia (Minister of Education)**, it was found that the weight of the expenditure of scarce judicial resources against the social cost of continued uncertainty in law created an issue that had to be looked at.

The *Charter* was designed to protect the most vulnerable, and the legislation should seek to protect the interest of minors from the danger of majority

rule.

Where these were unique circumstances, it is important for the adjudicative branch to be able to review the actions taken and the legislation made for -- to assess the actions and adjudicators for the acceptability of the legislation or restrictions in the future unique circumstances. Public health issues affect the most vulnerable in society and an inherent social cost is associated with them.

Thank you, Your Honour.

THE COURT: Ms. Olivier, are you aware of any cases where it says that the risk that this will happen again is sufficient for the -- for any one of the -- parts of the **Borowski** test for the Court to jump in, based on any one of the three parts of the **Borowski** test?

MS. OLIVIER: I believe there may have been, My Lord. I do not recall an exact case right now.

THE COURT: Pardon me?

MS. OLIVIER: I do not recall an exact

case referencing that, no.

THE COURT: Because that seems to be a common theme both with you and with Mr. Ray, that what we're really concerned about is this could happen again. And I'm not sure, I don't know if I've seen a case where the Court attaches itself to that reason, "This could happen again" as a basis for avoiding a dismissal based on mootness and the **Borowski** test.

And even if it is a legitimate factor, what degree of certainty do I have to have about a risk of it happening again? In other words, if it's something that happened, and it's pretty clear that it'll never happen again, is that small risk sufficient to move the matter forward, or did it have to be something where the Court has to be satisfied that the risk is substantial? Of course, when you're looking at the risk of something happening again, there's two elements to it, of course; you know, is there a legitimate probability it'll happen again? And even if there's a low probability, if it's

serious enough, then maybe those two work together that you should move in.

But I'm wondering if you have, do you know if any of the cases actually attacked that issue and confronted it and addressed it?

MS. OLIVIER: I think the case we relied on most was the **Tremblay** case.

THE COURT: What's it called?

MS. OLIVIER: Give me a second, I'll get -- **Tremblay versus Daigle**.

THE COURT: **Tremblay versus Daigle**?

MS. OLIVIER: Yeah.

THE COURT: And that's in your brief?

MS. OLIVIER: It is, My Lord.

THE COURT: Okay. Is there any particular paragraph there that speaks to that issue that you're aware of?

MS. OLIVIER: No, My Lord, I cannot highlight a specific paragraph.

THE COURT: Okay.

MS. OLIVIER: The -- it looked -- while I'm referencing it, it looked towards the future rights of future mothers in a similar situation, even though the situation was already moot.

THE COURT: So they found that -- without looking at the probability of something happening again, they focused their attention on the importance of the future rights of future mothers as being a relevant factor?

MS. OLIVIER: Yes, My Lord.

THE COURT: Okay. Okay, thank you, Ms. Olivier.

MS. OLIVIER: Thank you.

THE COURT: Mr. Boyle, anything in rebuttal?

MR. BOYLE: Thank you, Justice.

I will just cover a few points in response to Mr. Ray's and my friend's comments.

REPLY BY MR. BOYLE

MR. BOYLE: First, with respect to my friend's submissions we have just heard, much of what we heard echoes what was in the written submission. Both my friend and Mr. Ray have indicated that there are *Charter* issues at play in this proceeding. As I've indicated in my brief and in oral submissions earlier, those are not in the pleading as it presently reads; there are no *Charter* issues properly before this Court.

Further, even if there were the cases that I cited earlier, which I'll collectively refer to as the COVID cases, largely involve *Charter* considerations as part of their weighing of the factors. There were *Charter* issues pleaded and at play. Here we have nothing defined.

With respect to the comments of Mr. Ray, I won't comment on certain of his statements that, I would submit, go to the merits of the hearing more than the discrete issue of mootness that's before the Court today, and I would just ask the Court to recognize that

certain of the submissions do speak more to merits than whether the matter is moot.

With respect to Mr. Ray's comment that -- again, not evidence, but the submission that Citizens Alliance heard less from Dr. Strang after this matter was before, ---

THE COURT: Before I let you go on that one, the important -- and the merits of the issue go to -- or are for a different day, adjudicating the merits of the issue.

MR. RAY: Certainly, but today we're here for mootness, Justice.

THE COURT: Right.

MR. BOYLE: Yes.

THE COURT: But the merits, the importance of the issues, is that a relevant factor?

MR. BOYLE: I think again, to the issue of ---

THE COURT: Adversarial context?

Judicial economy or ---

MR. BOYLE: Impact, the ---

THE COURT: The third one; the Court's awareness of its adjudicative function?

MR. BOYLE: What's the effect going to be, Justice.

THE COURT: Okay.

MR. BOYLE: The word’s failing me, but the -- what is it -- utility.

THE COURT: Utility, right. Okay.

MR. BOYLE: Yes, the utility is the issue that, I would submit, is applicable there.

THE COURT: Okay, thank you.

MR. BOYLE: So ---

THE COURT: Can I ask you one thing?

MR. BOYLE: Sure.

THE COURT: What do you say to Mr. Ray's final comment about, you know, this notion that the government can do something and even if it's unlawful,

stop doing it and then say, "No more case; there's nothing -- there's nothing to be done here because we've now stopped doing something that was illegal"?

MR. BOYLE: I think that's precisely the circumstance, Justice, that the discretionary aspect of **Borowski** addresses, and in particular ---

THE COURT: Right.

MR. BOYLE: --- in *habeas corpus* cases that is routinely applied ---

THE COURT: Right.

MR. BOYLE: --- because of the nature of those proceedings.

THE COURT: Right.

MR. BOYLE: I would say it's inapplicable in the present case because there was such an extensive period over which the Order was applicable.

THE COURT: Right.

MR. BOYLE: And related to that point, Justice, the point I was going to make is to Mr. Ray's

comment that Citizens Alliance heard less from Dr. Strang after the October 2021 order, and refer to the pleading wherein Citizens Alliance has identified 21 total iterations that were issued between October 1st, '21 and July 6th, 2022. There was no change in government action.

THE COURT: Yeah.

MR. BOYLE: The Chief Medical Officer of Health continued about his business, without any impact as a result of this proceeding.

THE COURT: Could you go through, just very briefly, Mr. Boyle, for me this issue around that Ms. Walsh was talking about, the *Emergency Management Act* and the state of -- the state of emergency versus a health emergency under the *Health Protection Act*? And the state -- so just as I understand it, and help me out here, but a state of emergency was declared because of COVID under the *Emergency Protection Act;* correct?

MR. BOYLE: *Emergency Management Act.*

THE COURT: *Emergency Management Act.*

MR. BOYLE: Yes.

THE COURT: And within that state of emergency, Dr. Strang then exercised his authority under the *Health Protection Act*. Is that correct?

MR. BOYLE: No. No, Justice. These are two separate and distinct things. The *Emergency Management Act* is the emergency order that was issued.

THE COURT: Right.

MR. BOYLE: The reason it's material to this proceeding is because the Applicants at times have conflated the idea of the public health emergency with the Emergency Management Act.

THE COURT: Oh, I see.

MR. BOYLE: I believe the intention on their part is to submit that there ought to have been a public health emergency ---

THE COURT: Right.

MR. BOYLE: --- declared under section 53.

THE COURT: Right.

MR. BOYLE: To my submissions this morning, though, section 53 gives certain powers, section 32 gives other powers.

THE COURT: Right. And he was acting as an officer under section 32, is your argument.

MR. BOYLE: Right, Justice.

THE COURT: Okay.

MR. BOYLE: And, again, I don't want to go too far into ---

THE COURT: Into the merits, I understand.

MR. BOYLE: --- the merits, but at a high level, section 32 is specific to communicable illness.

THE COURT: Yeah.

MR. BOYLE: Fifty-three (53) is public health emergency. A communicable illness arguably could fall under section 53, but so could many other things;

hypothetically, arguably, domestic violence, gun violence, drink driving. These could be arguably defined as public health emergencies but have no communicable illness component.

THE COURT: Aspect to it, okay.

MR. BOYLE: So that's the distinction.

THE COURT: Okay.

MR. BOYLE: There was no requirement for a public health emergency to use section 32, which was in fact used. Respectfully, the section 53 argument and its powers is a red herring.

THE COURT: Okay.

(SHORT PAUSE)

MR. BOYLE: Sorry, Justice, I'm just referring to my notes ---

THE COURT: No, that’s fine.

MR. BOYLE: --- to make sure I'm not duplicating.

With respect to certain of my friends

-- or, sorry, Mr. Ray's comments about the impact on the organization, I've submitted this morning that there is no evidence before the Court of that submissions that similar organizations elsewhere in the country made tons of money. There's no evidence of that before the Court. There's no evidence of a harm. Just want to confirm that many of similar comments are just not supported by evidence in this proceeding.

Mr. Ray also mentioned that there were certain facts which would be uncontroversial: Pandemics can and will occur; vaccination recommended for Monkeypox. There's no evidence before the Court on that. Pandemics can take many forms. Based on the discussion Your Lordship had with Mr. Ray, we understand, based on that discussion, but again not based in evidence, that there is a declared pandemic at WHO level of Monkeypox, but as Your Lordship pointed out, there's no restrictions relating to that in Nova Scotia at this time.

This is just a demonstration of the

point I made earlier in submissions that any response to a communicable illness or a public health emergency will be derived from the facts: What are the circumstances? What are the needs to protect the public health at a point in time? And we cannot predict that at this point.

THE COURT: When did you originally file? What was the date of the original filing of your mootness Motion?

MR. BOYLE: I'm sorry, Justice?

THE COURT: Your original mootness Motion, what was the date? It was 2021, wasn't it?

MR. BOYLE: No, it was August of 2022. I'm thinking August 17th, Justice, but I'm not a hundred percent sure on that. I know that the first appearance before Your Lordship for directions was August 31st of 2022. So this is months after the original filing in October of '21.

THE COURT: Right. But it's only one month after the -- was it July of 2022 that the

restrictions were lifted?

MR. BOYLE: Yes, as they affected the public, yes.

THE COURT: Right.

MR. BOYLE: There are some concerns that identify with the suggestion by Mr. Ray that by going after an administrative decision-maker in their personal capacity it would deter similar actions by similar agents in future. That's a dangerous proposition, respectfully, Justice, that an administrative decision-maker with statutory responsibilities to protect public health with statutory immunity, which can be accepted in the case of bad faith, would sustain or limit future actions. That could potentially, in the context of communicable illness and public health emergencies, have a chilling effect that would be contrary to the public health. And, respectfully, that goes to my point this morning about, as you phrased it, Justice, staying in the lanes. There has to be an ability for administrative agents to react and

respond as appropriate to circumstances.

THE COURT: But do you agree that -- setting aside targeting, maybe, individual accountability, the notion of accountability generally is relevant to the **Borowski** equation, the three elements; the notion that a government actor, if they had acted unlawfully, could be relevant to one of the three **Borowski** tests?

MR. BOYLE: I think I ---

THE COURT: Steps?

MR. BOYLE: I would say yes, Justice, but with the caveat that there's a presumption that the -- I don't think it's controversial that government actors intend to act lawfully and will generally act lawfully. There will be exceptions to that which can be explored.

THE COURT: Right.

MR. BOYLE: But the -- as Your Lordship pointed out, ---

THE COURT: You're talking about the presumption that statutes are lawful in the first instance

and the government actors are presumed to be acting within their authority unless proven otherwise?

MR. BOYLE: Right. And they're ---

THE COURT: All right. But the notion of accountability is not completely foreign or irrelevant to the idea of -- to one of the **Borowski** stages?

MR. BOYLE: Right. But again, Justice, what's the utility?

THE COURT: Right.

MR. BOYLE: If the Public Health Order, as Mr. Ray suggested, of October of 2021 was unlawful, that has no bearing on any future use of the power, if any, under section 32 or 53. There was a point in time, there were facts at that time; was it lawful, was it not?

THE COURT: M'hm.

MR. BOYLE: The ---

THE COURT: Yeah, okay.

MR. BOYLE: Mr. Ray mentioned, "Crown

continues to prosecute offences." Just on that point, Justice, there was a case released just this week by the Court of Appeal, and obviously this hasn't been included in submissions, but the **Crown and Rabideau** 2024 NSCA 97, **Rabideau**. There was a dismissal of an appeal of a summary offence ticket, and one of the Court of Appeal's comments tied back to the **CCLA and Nova Scotia** decision, which is in the Book of Authorities for the Respondents. And the Court of Appeal, in dismissing the request for leave to appeal, commented that:

> the appeal doesn't raise an issue concerning an unsettled area of law, as this Court previously recognized the validity of *Health Protection Act*...

In that case, and it cites some paragraphs to that effect. So there has been some context in that case offered to what the Court of Appeal was looking to do in the civil liberties case.

THE COURT: Sorry; I'm not understanding the point that the -- they said that the purpose of the statute was legitimate? Is that -- sorry;

I'm not understanding the point.

MR. BOYLE: Well, that's what they say, yes. They've -- they're saying that the appeal -- in refusing to grant leave to appeal, one of the reasons they gave is that the appeal doesn't raise an issue concerning an unsettled area of law because the Court, the Court of Appeal, had previously recognized the validity of the Act, and they cite paragraphs 179, 140, and 263.

THE COURT: But I don't think anyone's suggesting that the Act, in and of itself, is valid. Isn't the argument that one of these actors, Dr. Strang, overstepped the authority he had under an otherwise lawful Act?

MR. BOYLE: I think it's an open question, Justice, because, as Mr. Ray has been saying, section 53 is the focus of Citizens Alliance, ---

THE COURT: Yeah.

MR. BOYLE: --- but section 32 is the use of the authority. Where this was an appeal of a

summary offence ticket, which involved an individual who received a fine under the *Health Protection Act* orders, ---

THE COURT: Right.

MR. BOYLE: --- they're saying that that has been found to have been valid for their decision, in my interpretation, Justice.

THE COURT: Right. But to your earlier point about, you know, different facts and distinguishing facts, the Court didn't say -- did the court opine in that case on the October 4 and the protocols under October 4 and the vaccine mandates?

MR. BOYLE: No Justice, just the ---

THE COURT: Just the idea of giving somebody a ticket under the ---

MR. BOYLE: Under the authority of the Act, yes.

THE COURT: Right, okay.

MR. BOYLE: Okay. Subject to any

further questions, Justice, those are my comments.

DECISION (Reserved)

THE COURT: Okay, thanks very much.

Okay, thank you very much everybody. I appreciate all your oral submissions today very much, and all the journals I've received so far, which I'm going to have to reflect on, and reserve my decision today.

Before I go though, I want to make sure I understand all the nuances as I write these things up.

Mr. Ray, you've been referring to Dr. Strang -- I've been referring to him as Dr. Strang, you've been referring to as Robert Strang. Is there an issue there? Is there a -- I don't want to -- you know, I'm not looking to ---

MR. RAY: I mean, it is ---

THE COURT: I only mention it because you caught yourself halfway through saying "Doctor," and then you changed to "Robert."

MR. RAY: We call the Respondent

Robert Strang. Robert Strang was granted, in 2005, the honorific of doctor by the Medical Association of Nova Scotia. He has no ability to practice medicine and has never had an ability to practice medicine in the Province of Nova Scotia.

THE COURT: Okay. But it's a question of, I guess, preferred style of referring to him, not a -- it's not a -- it's not otherwise a controversial issue? If I call them Dr. Strang, I'm not -- if you call him Robert Strang, there's no ---

MR. RAY: No. We acknowledge that he was given the right to use that by the authority that has the power to grant that right.

THE COURT: But you're saying he doesn't ---

MR. RAY: We choose not to use it, but it's simply ---

THE COURT: It's neither here nor there. Okay.

MR. RAY: Yes.

THE COURT: And -- okay, good. I just wanted to make sure I was understanding. I wasn't sure if I missed something along the way.

Okay. I will reserve, though, folks, but thanks again for your submissions. I'll have a decision to you in due course.

So thanks everyone. Have a good weekend.

THE CLERK: All rise.

The Supreme Court of Nova Scotia is now closed.

--- Upon concluding at 3:13 p.m.

CERTIFICATE OF COURT TRANSCRIBER

I, Patricia Cantle, hereby certify that I have transcribed the foregoing, and it is a true and accurate transcript of the evidence of Julie Lynn Robinson given in this matter, **Citizens Alliance v. Strang et al**, on December 6, 2024, taken by way of electronic recording.

_____

Patricia Cantle
Registration No. 2017-001
ICDR, ICDT
Certificate No. IAPRT-2142

Halifax, Nova Scotia
Friday, May 8, 2026